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An Investigation into the Cultural and Legal Factors Influencing the Differential Prosecution Rate for Female Genital Mutilation in England and France

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And above all to God, who makes all things possible. "Thy word is a lamp unto my feet, and a light unto my path".

ABSTRACT

Female Genital Mutilation (FGM) is a problem that both England and France face. Both countries agree that FGM is a criminal offence and that it constitutes child abuse. Accordingly, each nation has taken its own distinct measures in law and policy against the practice. These approaches have produced significantly divergent outcomes, particularly in the prosecution rates of offenders, with France leading in that regard.

This thesis seeks to understand why criminal justice outcomes differ so significantly between the two nations, despite many parallels between the historical and contemporary contexts of these two Western European neighbours. In order to do this, it seeks to explore the overarching, systemic forces at play within both paradigms, what the author has termed "the Medium". Furthermore, given that FGM within both France and England is a product of migrant communities having transported cultural practices into their new context, particular attention is paid to approaches to multiculturalism as a key aspect of the Medium for the purposes of this study. However, alongside this examination of the Medium, the study also explores the role of individual activism, and the agency of particular campaigners, termed "the Human Catalyst". It addresses the complex interplay between the Medium and the Human Catalyst, as a means of understanding their combined influence on the divergent pictures in respect of prosecuting FGM.

LIST OF ABBREVIATIONS

ACRWC African Charter on the Rights and Welfare of the Child

ASS Anti-Slavery Society

CAMS *Commission Pour L'abolition des Mutilations Sexuelles*

CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CBO Community based organisation

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CESCR Committee on Economic, Social and Cultural Rights

CPS Crown Prosecution Service

CPT European Committee for the Prevention of Torture

CRC Convention on the Rights of the Child

CSW Commission on the Status of Women

ECHR European Convention on Human Rights

ECHtR European Court of Human Rights

EU European Union

FGM Female Genital Mutilation

IAC Inter-African Committee on Traditional Practices that Affect the Health of Mothers and Children

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

MCP Multicultural policy

MIPROF Inter-Ministerial Mission for the Protection of Women against Violence and the Fight against Human Trafficking

MOJ Ministry of Justice

NGO Non-governmental organisation

PMI *Protection Maternelle Infantile*

PTSD Post-traumatic stress disorder

UDHR Universal Declaration of Human Rights

UK United Kingdom

UN United Nations

UNCRC United Nations Convention on the Rights of the Child

UNFPA United Nations Population Fund

UNGA United Nations General Assembly

UNICEF United Nations Children's Fund

WAGFEI Women's Action Group on Female Excision and Infibulation

WHO World Health Organisation

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CHAPTER ONE - INTRODUCTION

1.1 Introduction

Since the early 1980s, both England and France have grappled with the problem of Female Genital Mutilation. Migration transposed the harmful practice from countries where it had been embedded, including some former colonies. It should be noted that there have been social, political and legal moves to tackle FGM by states where the practice has long and deep cultural roots. Increasing recognition that communities had transported FGM to their adoptive western nations, prompted action in order to safeguard the health and well-being of children and adults in vulnerable situations.

The legal element of the anti-FGM response has taken distinct forms in the two states and has produced strikingly divergent outcomes when it comes to prosecution rates. Indeed, in France, over 35 cases have been prosecuted, whereas in England, only four cases resulted in criminal proceedings with only one conviction. The thesis investigates the reason(s) why England and France's prosecution outcomes differ so considerably.

To investigate this question, I identified and examined the relationship between two factors in legal and social change: -

1) Individual activism – this denotes the activism of key individuals in bringing about paradigm shifts in law, politics and society. In this specific case I was concerned with an individual in the French setting whose concerted efforts against FGM were pivotal to the French success.

2) Deterministic forces – this denotes the overarching, underlying societal forces that are independent of human action which influence the society's response to FGM.

The above factors, I have labelled the "Human Catalyst" and the "Medium" respectively, for clarity throughout this thesis. The "Human Catalyst" is representative of advocate Linda Weil-Curiel whose galvanising influence changed the trajectory of FGM in France. The "Medium" denotes a meta-context constitutive of the deterministic forces influencing the response to multiculturalism and consequently the response to FGM. Within the Medium I focused in particular on French republicanism and British multiculturalism. These two concepts are derived from historiography; the "Human Catalyst" originates from the so-called "Great Man theory", an understanding of societal development being impelled by the individual activism of influential key-players, and the "Medium" originates from the "Deterministic theory", a view predicated on societal events being moved by the wider deterministic forces, operating at a macro-level.[1] Debates on historical causality typically tend to pit these two determinants against each other or suggest a symbiosis; is it one or the other or is it both? In this legal study, it was my conclusion that there is an inseverable interdependence between the Human Catalyst and the Medium demonstrated in the various symbiotic ways they interact with each other in the French setting, and this explains why France has achieved far higher prosecution rates for FGM than England.

The Human Catalyst and the Medium, therefore, reflect the philosophical concepts from whence they emanate, and at the same time are designed to capture the specific

[1] The contextual meaning of the terms "Human Catalyst" and "Medium", as well as the philosophical concepts underpinning them will be explained in greater detail in chapters seven and eight.

circumstances of this legal study. These two conceptions, what they represent and why they shed light on the research question, will be discussed more fully in chapters seven and eight, with chapters five and six setting the stage to better understand them. However, in order for the reader to appreciate the systemic deterministic context which informs the “Medium”, it is necessary to understand the various component elements, which are discussed in chapters two, three and four. Once this context has been established, it is possible to examine the interplay between the Human Catalyst and the Medium, as the twin engines driving legal and social change.

1.2 Outline of the thesis

The current chapter (one) provides an introduction to the thesis, briefly outlines the chapter breakdown and explains the jurisdictional focus of the study.

Chapter two provides an extensive introduction to FGM which covers the various terminologies used to refer to FGM, the history of FGM, male circumcision, the symbolic cut and the reasons why FGM is practised. The aim of the chapter is to provide a solid background on what entails FGM, this involves engaging with topics often associated with FGM such as male circumcision and the symbolic cut.

Chapter three outlines the legal and policy framework addressing FGM internationally and at the domestic level in France and England, it addresses the historical development of an international human rights framework targeting FGM, including consideration of the specific human rights that are violated by the practice. The aim of the chapter is to provide a legal

foundation upon which to analyse more specifically France and England's approach to FGM in terms of application of law and policy, as well as analysis of the underlying forces that influence these laws and policies.

Chapter four examines elements of the Medium in each paradigm relevant to cultural diversity such as: multiculturalism and the models designed to respond to it, the claims for group rights against illiberal cultural practices, cultural relativism and its conflict with universal human rights, and feminism of colour and the problem of essentialising culture. I have focussed on this dimension of the Medium because in both England and France, the presence of FGM and the form of legal, social and political response are the result of cultural diversity and overarching approaches to the same.

Chapter five begins with an exploration of an important element of the French Medium, namely France's republican model of integration, and the particularity of French republicanism. The second part investigates how the ethos of French republicanism enabled law to be applied, examining a number of the cases that were prosecuted in the 1980s and 1990s. This discussion of the history of criminal proceedings also introduces the "Human Catalyst" who played a significant role in the French success. Thus the chapter as a whole sets up the later consideration of the complex interplay between the Human Catalyst and the Medium.

Chapter six performs a similar function in relation to England. In place of French republicanism, the element of the English Medium spot-lighted is the phenomenon typically referred to as "British multiculturalism" viz. the multifarious approach to cultural diversity that

has evolved within the United Kingdom, and is influential in the component territory of England. Again, the second part investigates how this aspect of the Medium played out in England's legal response to FGM by examining the passing of the Prohibition of Female Circumcision Act 1985, the Female Genital Mutilation Act 2003, the four cases prosecuted, and FGM protection orders. Taken together, chapters five and six reveal important contrasts between the English and French paradigms, and provides key context for the interplay between the Medium and the Human Catalyst.

Chapter seven further explains the way in which French republicanism and British multiculturalism influence responses to FGM, building on the insights in the two preceding chapters. It identifies the Human Catalyst as the key behind the French success, while also recognising the nuanced, yet important role that French republicanism played alongside the Human Catalyst. It synthesizes findings on this dynamic to provide a response to the research question at the core of the thesis.

Chapter eight succinctly summarises the findings of the project, drawing on the concepts of the Human Catalyst and the Medium, recapitulating the way in which they shed light on the research question. It concludes with a conscious focus on the human beings, girls and women, at the centre of these debates – the impetus behind the research question, and the study as a whole. Ultimately, the higher objective of this work was to provide new insights into the legal and state responses to FGM, with a view to contributing to the collective project of ensuring that all members of society are able to enjoy the full gamut of their human rights, and flourish to their greatest potential.

1.3 Jurisdictional Focus

This study will focus on England, rather than the entirety of the United Kingdom. There are two reasons for this, both legal and cultural. With regard to the law, the Great Britain presents a radically different paradigm from the centralised and uniform Constitutional model adopted in France. Scotland retained its own framework of criminal and civil law as part of the deal brokered with the social and political elite for consenting to the Act of Union 1707. In addition to this historical legacy, since the late 20th century, increased devolution to regional legislatures and executives has seen an ever growing divergence of legal arrangements between England, Wales and Scotland. Alongside this legal diversity, there is immense cultural variation between England, Wales and Scotland.[2] Prevailing attitudes towards matters such as family structure, children, identity and religion are distinct in each setting.[3]

Given the importance of the Medium for this study, the significance of this overarching context cannot be disregarded. I therefore concluded that the most practical solution was to focus exclusively on one of the component nations, England, in order to be in a position to provide a sufficiently sensitive and nuanced analysis. Obviously, however, England is a component part of the United Kingdom, and at times it is necessary to consider the broader state setting, but the primary focus for the work is on England.

[2] Javier García Oliva and Helen Hall, *Constitutional Culture, Independence and Rights: Insights from Quebec, Scotland, and Catalonia* (University of Toronto Press 2023) 406; Krishan Kumar, *The Making of English National Identity* (Cambridge University Press 2009) 12.
[3] Javier García Oliva and Helen Hall, *Constitutional Culture, Independence and Rights: Insights from Quebec, Scotland, and Catalonia* (University of Toronto Press 2023) 407.

CHAPTER TWO – WHAT IS FEMALE GENITAL MUTILATION

2.1 Introduction

In order to understand responses to Female Genital Mutilation (FGM) within the England and French contexts, and to analyse how each Medium might respond to the phenomenon, it is first necessary to outline what FGM entails. This chapter sets out the nature of the practices contained within the label, and the reasons for their negative impact.

FGM is a harmful practice with adverse physical and psychological consequences and no health benefits to girls and women.[4] The United Nations Children's Fund (UNICEF) estimates that at least 200 million girls and women in 30 countries have been subjected to FGM,[5] while World Health Organisation (WHO) estimates that more than 3 million girls are at risk of undergoing FGM annually.[6] A constructive discussion of this issue requires a nuanced and sophisticated understanding of the practice. In view of some commentators, there has been a tendency for voices external to the geographical and cultural contexts of practising communities to be critical and judgemental[7], relying on what Gruenbaum calls a "simplistic denunciation",[8] without fully comprehending the socio-cultural complexities at play. Boddy opined that, "Understanding the practice is not the same as condoning it. It is, I believe, as

[4] WHO, Female Genital Mutilation Key Facts https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed 31 May 2019.
[5] UNICEF, Female genital mutilation/cutting: a global concern (2016) *New York: UNICEF*, 1-4.
[6] WHO, Female Genital Mutilation Key Facts https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed 31 May 2019.
[7] See for example, Allan Worsley, 'Infibulation and Female Circumcision A Study of a Little-known Custom' (1938) 45(4) BJOG 686; Mary Daly, *Gyn/ecology: The Metaethics of Radical Feminism* (Women's Press 1978) 170.
[8] Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (University of Pennsylvania Press 2001) 1.

crucial to effecting the operation's eventual demise that we understand the context in which it occurs as much as its medical sequelae".[9]

2.2 Definition and Typology

The WHO defines FGM as comprising "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons".[10] WHO, UNICEF and the United Nations Population Fund (UNFPA) interagency statement published in 2008 is a revised version of the 1997 joint statement on FGM and it classifies the different types of FGM as follows:

> **Type I:** Partial or total removal of the clitoris and/or the prepuce.[11] Also known as clitoridectomy. Some practising communities refer to it as *sunna* which is Arabic for 'duty' or 'tradition'.[12]
>
> **Type II:** Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.[13] This type of cutting is more extensive than Type I, however, there is considerable variability in the form or degree of cutting.[14]
>
> **Type III:** Narrowing of the vaginal orifice with creation of a covering seal by cutting and repositioning the labia minora and/or the labia majora, sometimes through stitching,

[9] Janice Boddy, 'Body Politics: Continuing the Anti-circumcision Crusade' (1991) 5 Medical Anthropology Quarterly 16.
[10] WHO, 'Female genital mutilation key facts' https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed 14 May 2019.
[11] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 4.
[12] UNICEF, Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change (2013) 7.
[13] WHO, 'Female genital mutilation key facts' https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed 14 May 2019.
[14] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 4.

with or without excision of the clitoral prepuce.[15] Also known as infibulation. The adhesion of the labia results in near complete covering of the urethra and the vaginal orifice, which must be reopened for sexual intercourse and childbirth, a procedure known as 'defibulation', and in some instances, this is followed by reinfibulation.[16]

Type IV: All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization.[17] Pricking or nicking involves cutting to draw blood, but no removal of tissue and no permanent alteration of the external genitalia.[18]

While the above anatomical typology provides a clear description of the varying procedures, UNICEF cautions that it may be more useful in "clinical observation than in surveys that rely on self-reports".[19] Yoder et al explain that establishing equivalence between locally defined types and the WHO typology is not a simple matter since practising communities will normally have their own language and ways of classifying the cuts which do not necessarily correspond with WHO's typology.[20] During the UK parliamentary debates for the Serious Crimes Act 2015 that introduced new provisions to the Female Genital Mutilation Act 2003 (2003 Act), the question whether to formally adopt the WHO definition/typology into domestic legislation was considered, but ultimately it was decided against amid concerns that it would interfere with ongoing cases.[21] The WHO definition was however juridically adopted by Sir James

[15] WHO, 'Female genital mutilation key facts' https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed 14 May 2019.
[16] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 4.
[17] Ibid.
[18] UNICEF, Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change (2013) 7.
[19] Ibid.
[20] P Stanley Yoder, Noureddine Abderrahim, and Arlinda Zhuzhuni, Female Genital Cutting in the Demographic and Health Surveys: A Critical and Comparative Analysis (DHS Comparative Report No 7 2004) 19.
[21] HL Deb Hansard 5 November 2014, vol 756 col 1636.

Munby (then President of the Family Division) in *Re B and G* where he stated: "Knowledge and understanding of the classification and categorisation of the various types of FGM is vital. The WHO classification is the one widely used. For forensic purposes, the WHO classification, as recommended by Professor Creighton is the one that should be used".[22]

While this provides much needed clarity in identifying the type of FGM a girl has been subjected to during a trial, Type IV FGM is harder to classify under the 2003 Act. The definition provided in the Act "…mutilates the whole or any part of a girl's labia majora, labia minora or clitoris"[23] fits in with excision and infibulation but not with Type IV which is the least invasive. In such circumstances it is for the criminal court to decide in individual cases whether a case of Type IV FGM amounts to mutilation under the 2003 Act.[24]

2.3 Terminology

Terminology is widely debated in public discourse and the polemics underscore the complexities of FGM.[25] The most commonly used term presently is female genital mutilation or female genital mutilation/cutting (FGM/C). The language has evolved over the years, and initially the practice was referred to as 'female circumcision' since it is carried out in some practising communities as part of male and female rites of passage, thus given the same name.

[22] *Re B and G (Children) (No 2)* [2015] EWFC 3 [79].
[23] Female Genital Mutilation Act 2003.
[24] HM Government, Multi-agency statutory guidance on female genital mutilation (2016) s 3.1.4.
[25] L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 289; Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19 Feminism and the Law 941.

The term 'female circumcision' was however found wanting as it "draws a parallel with male circumcision and, as a result, creates confusion between these two distinct practices".[26]

La Barbera argues that practising communities reject the term 'mutilation', "refusing the idea that they are disfigured and are maiming their daughters in return", hence favouring the term circumcision as a rite of passage.[27] Gruenbaum observes that in Sudan, the term 'mutilation' is deeply offensive as some perceive it to be an accusation – that their objectives are evil and meant to cause intentional harm.[28] The WHO argues that the term FGM "establishes a clear linguistic distinction from male circumcision, and emphasizes the gravity and harm of the act".[29] Further, the term 'mutilation' "reinforces the fact that the practice is a violation of girls' and women's rights, and thereby helps to promote national and international advocacy for its abandonment".[30]

The term 'female genital mutilation' was adopted in 1990 at the third conference of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (IAC) and in 1991 WHO recommended that the United Nations adopt this term.[31] The difficulty with terminology is to do with cultural sensitivity/cultural relativism and the range of procedures from excision to infibulation. Long opines that 'mutilation' as a blanket term must be favoured to cover the range of practices, arguing that the severe complications and side effects justify

[26] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 22.
[27] Maria Caterina La Barbera, 'Revisiting the Anti-Female Genital Mutilation Discourse' (2009) 9 Diritto & questioni pubbliche 488.
[28] Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (University of Pennsylvania Press 2001) 3.
[29] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 4.
[30] Ibid.
[31] Ibid.

the adoption of the term mutilation.[32] Scholars who reject the term FGM base their reasons on cultural relativism, arguing that the term 'mutilation' reflects the western perspective and has the effect of demonizing communities who do not consider the practice as "maiming, rather as a body modification satisfying canons of beauty, hygiene and social order that are deeply rooted in their cultures".[33]

Danial contends that, "although FGM is a more scientifically correct term, the implications of the word profoundly confer a moralizing tone that hastily concludes negative implications before an explanation is offered".[34] In this regard, the term FGM has been criticized as being ethnocentric by scholars such as Obiora, who instead uses the term 'circumcision', arguing that it is what indigenous African coalitions prefer.[35] La Barbera contends that although no name is "value-neutral", the term 'female genital cutting' is a successful attempt by the United Nations Population Fund (UNFPA) as its explicit intent is to be non-judgmental.[36] The terms 'female genital cutting' and 'female genital mutilation/cutting' have increasingly been used since the late 1990s by scholars and some agencies as there is evidence that using the word 'mutilation' is counter-productive, since it alienates practising communities thereby impeding change in social attitudes towards FGM.[37]

[32] Sarah Long, 'Multiculturalism and Female Genital Mutilation' (2004) 1 UCL Jurisprudence Review 172.
[33] Maria Caterina La Barbera, 'Revisiting the Anti-Female Genital Mutilation Discourse' (2009) 9 Diritto & questioni pubbliche 488.
[34] Sandra Danial, 'Cultural Relativism vs. Universalism: Female Genital Mutilation, Pragmatic Remedies' (2013) 2 The Journal of Historical Studies 1.
[35] L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 290.
[36] Maria Caterina La Barbera, 'Revisiting the Anti-Female Genital Mutilation Discourse' (2009) 9 Diritto & questioni pubbliche 489.
[37] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 22.

When speaking to women who have undergone FGM, it is advised that asking "'have you been cut or had any parts removed' rather than using the word mutilation is a more respectful stance and displays sensitivity to what may have been a traumatic experience for a woman".[38] The use of sensitive language is especially useful to health professionals as it "may result in more information being given about the FGC which is needed in order to plan care and follow up with an appropriate professional".[39] UNICEF and UNFPA use female genital mutilation/cutting (FGM/C) to capture the significance of mutilation at the policy level while simultaneously using less judgmental terminology for practising communities.[40]

Johnsdotter suggests using the term circumcision when referring to practicing communities as it is the best translation of most locally used terms where these practices exist, and FGM when referring to legislation and policy frameworks, as this is the established term in political, legal, and activist contexts.[41] She argues that "employing both terms also serves to remind us that the phenomenon of girls being genitally cut for non-medical reasons is construed differently among those who practise it and those who strive to end these traditions".[42] For the purposes of this research project, I will primarily use the term female genital mutilation. The terminology is adopted because it reflects the language adopted within the English legal framework, and also is unambiguous in owning the inherently harmful nature of the practice. However, the terms female circumcision, excision or cutting will also be used appropriately where necessary.

[38] Sarah Esegbona-Adeigbe, 'Have you been mutilated…?' How should we ask women if they have undergone female genital cutting?' (2013) 4 Essentially MIDIRS 35.
[39] Ibid.
[40] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 22.
[41] Sara Johnsdotter, 'Meaning well while doing harm: compulsory genital examinations in Swedish African girls' (2019) 27(2) Sexual and Reproductive Health Matters 87.
[42] Ibid.

2.4 The History of FGM

Based on the geographic distribution of FGM, it is believed that the practice originated on the western coast of the Red Sea (modern day Egypt) where infibulation is most prevalent, spreading westward and southward and diminishing over time to clitoridectomy.[43] A Greek papyrus of 163 BC confirms that the procedure was performed in Memphis (Egypt).[44] One theory that explains FGM origin in ancient Egypt is rooted in the "Pharaonic belief in the bisexuality of the gods", a trait they believed was reflected by mortals, in that "every individual possessed a male and female soul".[45] They believed that the foreskin held the feminine soul and the clitoris held the male soul, thus making it necessary to excise the foreskin from the man and the clitoris from the woman for healthy gender development.[46]

Another theory suggests that there is an association between infibulation and slavery.[47] Before the rise of Islam, from the dynastic to Byzantine period, Egyptians raided the black South for slaves who were exported through the Red Sea to the Persian Gulf.[48] It is reported that female slaves were sown up to make them unable to conceive, which made them pricier, "both for their chastity and for better confidence which their Masters put in them".[49] But as the region converted to Islam, it was no longer possible for the Egyptian elite to populate their

[43] Gerry Mackie, 'Ending Foot binding and Infibulation: A convention account' (1996) 61 American Sociological Review 1003.
[44] Hilary Burrage*, Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 82.
[45] Elizabeth H Boyle, *Female genital cutting: Cultural conflict in the global community* (Johns Hopkins University Press 2002) 27.
[46] Ibid.
[47] Gerry Mackie, 'Ending Foot binding and Infibulation: A convention account' (1996) 61 American Sociological Review 1003.
[48] Ibid.
[49] Ibid.

harems with local slaves since Islam prohibits Muslims from enslaving other Muslims.[50] This made it necessary for slave traders to reach farther into the African continent to find non-Muslim slaves to populate the harems and presumably, they introduced FGM in these remote areas to increase the value of the slaves.[51] This led to both Islam and FGM spreading along the expanding slave routes. And although FGM predated Islam, the belief that it promoted chastity, "corresponded with the Islamic ideals of family honour, female chastity, and seclusion, which may have contributed to its widespread adoption in some areas".[52]

FGM origin has also been associated with treating what was considered sexual dysfunctions in women. A Greek physician, Aetios, reported that in the sixth century AD, Egyptians used FGM to remove "the deformity of 'overly large' clitorises, to stop irritation and anticipated resulting sexual appetite".[53] Clitoridectomy was also used in Victorian England and America in to treat "depression, masturbation and nymphomania".[54] In 1866, English doctor, Isaac Baker Brown, proposed in his book, 'On the Curability of Certain Forms of Insanity, Epilepsy, Catalepsy, and Hysteria in Females', that the feminine weaknesses (referred to in the title) could be cured by excising the clitoris, which procedure had to be followed by "careful watching and moral training" by parents and friends to make the improvement permanent.[55] Brown's book was scathingly reviewed by the British Medical Journal which "disputed the claims for his operation, questioned the extremity of the procedure, and observed that the moral training and careful watching Brown recommended following the operation might in

[50] Elizabeth H Boyle, *Female genital cutting: Cultural conflict in the global community* (Johns Hopkins University Press 2002) 28.
[51] Ibid.
[52] Ibid.
[53] Hilary Burrage*, Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 88.
[54] Ibid 84.
[55] Sheehan Elizabeth, 'Victorian Clitoridectomy: Isaac Baker Brown and His Harmless Operative Procedure' (1981) 12 Medical Anthropology Newsletter 10.

themselves cure the disorder".[56] The journal, however, did not dispute Brown's contention that masturbation caused the various illnesses he named, though this is unsurprising, given that masturbation was widely held to be dangerous to the health of both males and females by clinicians and wider society alike.[57]

Sheehan notes that this was not the first time clitoridectomy was published in the journal; Brown himself had published reports of his earlier experiments, and the Journal had featured several reports on the procedure by other physicians.[58] Burrage thus speculates that the opposition to Brown from other doctors could have been triggered, at least in part, by "professional jealousies rather than fundamental disagreements about medical facts and practice" although this contention is not well supported by evidence.[59] Clitoridectomy was a lucrative business and despite the medical opposition in England, Brown managed to introduce it to mainstream society in the United States before he died.[60]

Duffy avers that whereas clitoridectomy was rarely performed in English-speaking nations, a small minority of practitioners advocated for it, particularly in response to the perceived dangers of female masturbation. In 1894, Dr Bloch of New Orleans referred to it as a "moral leprosy" describing how a 14-year-old schoolgirl suffering from "nervousness and parlour was cured by liberating the clitoris from its adhesions and by lecturing the patient on the dangers of masturbation".[61] Duffy reports that Bloch was one of the last American surgeons to resort

[56] Sheehan Elizabeth, 'Victorian Clitoridectomy: Isaac Baker Brown and His Harmless Operative Procedure' (1981) 12 Medical Anthropology Newsletter 11.
[57] Ibid.
[58] Ibid.
[59] Hilary Burrage*, Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 84.
[60] Ibid 85.
[61] The Female Genital Cutting Education and Networking Project, 'Clitoridectomy: A Nineteenth Century Answer to Masturbation' http://www.fgmnetwork.org/articles/duffy.htm accessed 10 August 2019.

to clitoridectomy.[62] However, evidence suggests that it persisted until the 1950s and 1960s – in 1958 Dr McDonald proposed clitoridectomy for "irritation, scratching, irritability, masturbation, frequency and urgency".[63] Eventually, attention shifted from hysteria to more aesthetic considerations which led to the more recent emergence of female genital cosmetic surgery.[64]

2.5 The Symbolic Cut

The lesser form of FGM (Type IV) is sometimes referred to as "symbolic circumcision" with some communities describing it as a traditional form of FGM.[65] It has raised the issue of the 'symbolic cut' as a safer alternative to the more severe forms of FGM. The symbolic cut is highly controversial and has encountered considerable criticism. It was proposed in 1996 in Washington, Seattle by the Harborview Medical Centre[66], and in 2004 by Dr Omar Abdulcadir, a gynaecologist at the Centre for the Prevention and Therapy of FGM, Careggi Hospital, Italy.[67] The compromise was proposed by both hospitals following requests by women to have their daughters circumcised, who insisted that they would have the procedure done one way or the other. The alternative procedure proposed by Dr Abdulcadir involved "puncturing the clitoris under local anaesthesia to allow a few drops of blood out",[68] while the Seattle hospital

[62] The Female Genital Cutting Education and Networking Project, 'Clitoridectomy: A Nineteenth Century Answer to Masturbation' http://www.fgmnetwork.org/articles/duffy.htm accessed 10 August 2019.
[63] Hilary Burrage*, Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 85.
[64] Ibid.
[65] UNICEF, Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change (2013) 7.
[66] Doriane Lambelet Coleman, 'The Seattle compromise: multicultural sensitivity and Americanization' (1998) 47 Duke Law Journal 745.
[67] Turone Fabio, 'Controversy surrounds proposed Italian alternative to female genital mutilation' (2004) 328 British Medical Journal 247.
[68] Ibid.

proposed “a small cut to the prepuce, the hood above the clitoris, with no tissue excised, and this would be conducted under local anaesthesia”.[69] The “Seattle compromise”, as it came to be known, included a requirement for consent by “a child old enough to understand the procedure”, plus the informed consent of the parents.[70] Both proposals failed following immense public criticism and campaigns against them.

Proponents of the symbolic cut argue that it allows practising communities to maintain a culturally meaningful tradition while ensuring the safety and well-being of girls. On the other hand, La Berbera asserts that in Western eyes, allowing even a medicalized symbolic form of FGM would mean “legitimizing a barbaric ritual”.[71] Di Pietro et al argue that if the rationale for condemning FGM is purely that it harms bodily integrity then a non-invasive symbolic prick of the clitoris can be considered as relatively harmless and thus acceptable; however, if the condemnation is not just about preserving bodily integrity and considers the symbolic value of FGM which is degrading and offensive to women then it cannot be tolerated.[72] It also raises complex questions of children’s rights. The infliction of anxiety and injury upon a child in order to satisfy the needs and desires of adults, regardless of whether they are parents, is problematic. It might be proposed that a “best interests” case could be mounted, justifying this intervention on the grounds that it could reduce risk of more serious harm and allow the girls undergoing the cut to embrace their cultural heritage with minimal physical jeopardy. Nonetheless, this is a difficult argument to sustain, when the risk of greater injury is only being

[69] Doriane Lambelet Coleman, ‘The Seattle compromise: multicultural sensitivity and Americanization’ (1998) 47 Duke Law Journal 745.
[70] Ibid.
[71] Maria Caterina La Barbera, ‘Revisiting the Anti-Female Genital Mutilation Discourse’ (2009) 9 Diritto & questioni pubbliche 500.
[72] Maria L Di Pietro, Adele A Teleman and Maurizio P Faggioni, ‘Female genital mutilation of minors in Italy: is a harmless and symbolic alternative justified?’ (2012) 9 Italian Journal of Public Health 2.

presented by the adults demanding the procedure. The case that being injured to a slight degree is in a child's best interests, because it will reduce the temptation to injure them more gravely, is not logically persuasive.

In any event, a further interesting aspect of the symbolic cut is its legality. In Italy, the statutory definition of FGM does not include the non-invasive Type IV FGM, however, guidelines from the Ministry of Health includes the WHO's definition/typology making a Type IV symbolic prick illegal.[73] In America, the Federal Prohibition of Female Genital Mutilation Act, also does not include Type IV FGM in its definition. Coleman thus argues that the Seattle compromise which proposed "a mere bloodletting", then "as a textual matter, the procedure did not fit within the statutory definition of FGM and thus would not have violated the law".[74]

Considering the same in England, as aforementioned, the definition in the 2003 Act does not include Type IV FGM hence strictly speaking, a symbolic prick would not be illegal (provided that it was so small as to inflict only 'transient' or 'trifling' injury; any mark which amounted to actual bodily harm would be criminal, even if done to an adult, under the Common law). In relation to the statutory regime, FGM guidelines provide that it is the criminal court's discretion as to what constitutes mutilation in unclear cases. Therefore, it would be upon the court to decide whether a symbolic cut would be considered mutilation under the Act.

[73] Maria L Di Pietro, Adele A Teleman and Maurizio P Faggioni, 'Female genital mutilation of minors in Italy: is a harmless and symbolic alternative justified?' (2012) 9 Italian Journal of Public Health.
[74] Doriane L Coleman, 'The Seattle compromise: multicultural sensitivity and Americanization' (1998) 47 Duke Law Journal 751.

Additionally, and perhaps the most important legal consideration, is whether the symbolic cut violates child protection laws. Sir James Munby in *Re B and G* held that "any form of FGM constitutes 'significant harm' within the meaning of sections 31 and 100 of the Children Act 1989".[75] He cited the judgment in *Re B (Care Proceedings: Appeal)* that "any form of FGM, including FGM WHO Type IV, amounts to 'significant harm'".[76] Crossing this threshold triggers both a right and duty on the Local Authority to intervene.

2.6 Parallels with Male Circumcision

The women who triggered the Seattle compromise, challenged Dr Miller, a gynaecologist at the Harborview hospital, on the apparent differential treatment between male and female circumcision as below: -

> Dr Miller's patients have told her that they are confused that Americans encourage the circumcision of their sons but refuse a less invasive symbolic *sunna* for their daughters. 'We will cut the whole foreskin off a penis,' said Dr Miller, relaying their frustration, 'but we won't even consider a cut, a *sunna,* cutting the prepuce, a little bloodletting (on a girl)'.[77]

The above excerpt opens the discussion into what is an intense debate between FGM and male circumcision. The point of contention is, are they comparable? Public discourse is divided

[75] *Re B and G (Children) (No 2)* [2015] EWFC 3 [68].
[76] *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 2 FLR 1075 [185].
[77] Doriane L Coleman, 'The Seattle compromise: multicultural sensitivity and Americanization' (1998) 47 Duke Law Journal 749.

between those who oppose FGM but find male circumcision unproblematic and tolerable, and those who oppose male circumcision and argue that the two practices should be treated similarly.[78] The opposition to the Seattle compromise was based on the argument that it went against the intention of the federal law which is to "criminalize any medically unnecessary procedure involving female genitalia".[79] Davis argues that no such legal constraints apply to the circumcision of infant boys. According to federal law even a tiny prick done in a safe medical environment on a female's genitalia is illegal, yet in comparison to the symbolic prick, male circumcision is a more substantial procedure but is legal even when done by traditional excisers in the home.[80]

Similarly, in England, FGM is criminalized under the 2003 Act, whereas male circumcision is not illegal. Sir James Munby in *Re B and G* is said to have "muddied the waters by conflating male circumcision with female circumcision".[81] In his judgment, he stated that in his view some forms of Type IV such as pricking and piercing were much less invasive than male circumcision.[82] He contended that, "… if FGM Type IV amounts to significant harm, as in my judgment it does, then the same must be so of male circumcision".[83] However, although he felt that male circumcision did amount to significant harm, under the Children Act 1989, a care order could only be warranted if the significant harm fell below the reasonable expectations of a parent. Of this he held: -

[78] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 90.
[79] Dena S Davis, 'Male and Female Genital Alteration: A collision course with the Law?' (2001) 11 Health Matrix 509.
[80] Ibid 510.
[81] Ruari D McAlister, 'Commentary: A Dangerous Muddying of the Waters?' (2016) 24 Medical Law Review 261.
[82] *Re B and G (Children) (No 2)* [2015] EWFC 3 [60].
[83] Ibid [69].

> Whereas it can never be reasonable parenting to inflict *any* form of FGM on a child, the position is quite different with male circumcision. Society and the law, including family law, are prepared to tolerate non-therapeutic male circumcision performed for religious or even for purely cultural or conventional reasons, while no longer being willing to tolerate FGM in any of its forms.[84]

Earp questions this divergent treatment despite both practices having some similarities. He argues that both involve "the incision (and usually, though not always, the excision) of healthy erogenous tissues, they both concern a person's "private parts" yet are done without their consent, and neither involve the treatment of disease or correction of an acknowledged deformity".[85] In contrast, Schwartz argues that the practice in women is "more dangerous and disfiguring" taking away an "essential part of their humanness" and preventing them from being "full participants in sexual relations".[86] He equates FGM not to male circumcision but to castration.[87] Commenting on Schwartz's view, Earp opines that "the perspective alludes to a harm-based argument for the (distinctive) impermissibility of female forms of genital alteration", that the level of harm caused by FGM "passes a threshold of intolerability that is not passed by male circumcision".[88]

[84] *Re B and G (Children) (No 2)* [2015] EWFC 3 at para 72.
[85] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 90.
[86] Robert L Schwartz, 'Multiculturalism, Medicine and the Limits of Autonomy' (1994) 3 Cambridge Quarterly of Healthcare Ethics 440.
[87] Ibid.
[88] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 90.

These views are redolent of the harm versus benefit argument. Leading global organisations such as the WHO affirm that FGM has no health benefits and only causes harm.[89] On the other hand, with male circumcision, "there is compelling evidence that male circumcision reduces the risk of heterosexually acquired HIV infection in men by approximately 60%".[90] Positions that justify opposing FGM and endorsing male circumcision often include: no health benefits to warrant bodily harm, the health risks associated with FGM may be too severe to justify it for non-therapeutic reasons, and the non-therapeutic reasons premised on religion and culture do not outweigh the significant bodily harm and associated health risks.[91]

While there is considerable literature ascribing the health benefits of male circumcision, such do not exist for FGM.[92] However, Van den Brink and Tigcheelar contend that the health risks argument cannot always be used in favour of all forms of male circumcision since there are "invasive forms of male circumcision and very light forms of female circumcision and the other way around".[93] They argue that there is a tendency to look at FGM as a cultural harm that perpetuates women as subordinate and ignoring male circumcision even in instances where the two procedures are comparable.[94] In this regard, Mazor asserts, "Even if male and female genital cutting were perfectly identical in terms of net health benefits and effects on sexual pleasure, the relationship in some cultures between female genital cutting and a failure to

[89] WHO, 'Female Genital Mutilation: Key Facts' https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed 21 September 2019.
[90] WHO, 'Male circumcision for HIV prevention' https://www.who.int/hiv/topics/malecircumcision/en/ accessed 21 September 2019.
[91] Marjolein Van den Brink and Jet Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human Rights 438.
[92] Aaron Tobian and Ronald Gray, 'The Medical Benefits of Male Circumcision' (2011) 306(13) PubMed Central 1479–1480.
[93] Marjolein Van den Brink and Jet Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human Rights 438.
[94] Ibid.

respect women as moral equals would give an additional reason to object to female circumcision".[95] Earp calls this the "symbolic meanings" argument.[96]

Van den Brink and Tigcheelar suggest these three frames dominate the discussion on male and female circumcision: the medical/health frame, the cultural and/or religious frame and the human rights frame.[97] For male circumcision, the medical frame is dominant, serving to oppose or defend the practice for bodily reasons, whilst the cultural and religious frame refer to non-bodily reasons to oppose or defend the practice.[98] The human rights frame is treated as an "accessory… to strengthen (one or both of) the other frames in the discussion whether (a certain form of) male circumcision is legitimate or not and can be found in both areas".[99] However, for FGM, the human rights frame is the most dominant for opposing the practice.[100] The medical frame is hardly used in support of FGM, rather to oppose it, whereas reliance on the religious frame is minimal, and it appears that, often, the cultural frame represents an "anti-position".[101]

The most compelling argument against any form of circumcision is (the right to) bodily integrity.[102] In male circumcision, the right to bodily integrity dominates the human rights frame and whereas it is not specifically formulated in a binding human rights instrument in

[95] Joseph Mazor, 'The child's interests and the case for the permissibility of male infant circumcision' (2013) 39 J Med Ethics 427.
[96] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 91.
[97] Marjolein Van den Brink and Jet Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human Rights 428.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Wim Dekkers, Cor Hoffer and Jean-Pierre Wils, 'Bodily integrity and male and female circumcision' (2005) 8 Medicine, Health Care and Philosophy 180.

the EU, it is connected to other specific rights such as the right to privacy.[103] A significant difference between male and female circumcision within the human rights frame is the unquestioned acceptance of all forms of FGM as "harmful, violent and tortuous", that ought to be banned not just to children but also to consenting adults.[104] In terms of bodily integrity, protection against external interference of the body is of utmost concern in FGM whereas with male circumcision, there are many "in-between positions that take into account the form of the circumcision, the dimension of health benefits, the seriousness of health risks or other harm… as well as different interpretations of bodily integrity… however, these in-between positions are virtually absent as regards FGM".[105]

Returning to the 'symbolic meanings' argument which contributes significantly to the differential treatment between male circumcision and FGM, a counter-argument has been posed. Van den Brink and Tigcheelar assert that male circumcision as "a form of sex discrimination" appears to be an absent point of view in the discourse, moreover, some have characterised the discounting of male circumcision as a legitimate issue for consideration in the international human rights agenda, as "a form of gender bias in itself".[106] If FGM is opposed on the rationale that it is a custom fuelled by patriarchy, it follows that the same logic and opposition should be made for male circumcision, which Earp argues is itself "a gendering practice" that is intertwined with patriarchal notions of masculinity as well as customs that foster male domination.[107]

[103] Marjolein Van den Brink and Jet Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human Rights 431.
[104] Ibid 432.
[105] Ibid 435.
[106] Ibid 436.
[107] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 96.

The issue of comparability between male circumcision and FGM is highly relevant from a human rights perspective.[108] If there is truth in the alleged similarities between the two practices, why are all forms of FGM intolerable as human rights violations while all forms of male circumcision are deemed – in principle – unproblematic from a human rights perspective?[109] Doesn't that undermine the universality claim that is central to human rights ethos? Doesn't it also undermined the gender equality principle, which should only be breached if there are objective and reasonable justifications?[110]

How can these inconsistencies be reconciled? According to Van den Brink and Tigcheelar, for male circumcision and FGM to be treated in a way that reflects the true universal nature of human rights, both practices must be seen as violating the right to bodily integrity that is guaranteed to all human beings irrespective of gender.[111] They suggest that the first consideration should be the level of harm caused by the intervention which should include, immediate pain, health consequences, the irreversibility of the procedure and whether and to what extent the risk of harm can be mitigated by the manner in which the operation is done.[112] The implication here is a procedure such as symbolic pricking should be unproblematic. The second consideration is consent, since autonomy and self-determination are essential to one's enjoyment of bodily integrity.[113] In this regard, they suggest that adult

[108] Marjolein Van den Brink and Jet Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human Rights 420.
[109] Ibid.
[110] Ibid 443.
[111] Ibid.
[112] Ibid.
[113] Ibid.

requests should be honoured and the circumcision of children should be postponed until they are capable of deciding for themselves.[114]

The third consideration is the "weight of the rationale of the bodily intervention and whether there are other less intrusive ways to serve that rationale".[115] For instance, the health rationale for male circumcision (prevention of HIV/AIDS) is considered insufficient since there are other less invasive means of achieving this purpose.[116] The "notions of beauty and normalcy" which justify the American type circumcision routinely carried out on new-born boys is also not substantial.[117] Contrarily, the Jewish religious obligation to circumcise new-born boys is a rather strong and compelling religious rite which cannot be easily substituted by some other alternative.[118] The cultural rationale which justifies the African type circumcision, can be quite strong with regard to the aim to be achieved, such as becoming a fully-fledged member of the community, which can thus be problematic for the invasive forms of FGM and male circumcision.[119]

The fourth consideration is the "legitimacy of the rationale" – health benefits would be the most legitimate rationale for male circumcision (putting aside the arguments challenging this rationale).[120] Van den Brink and Tigcheelar question whether "circumcision lacks legitimacy as far as the rationale aims at or perpetuates gender inequality".[121] They suggest that the

[114] Marjolein Van den Brink and Jet Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human 444.
[115] Ibid
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.

legitimacy of such rationales should be considered increasingly problematic; procedures such as infibulation designed to ensure the status of women as the property of men are not legitimate.[122] Other forms that are symbolic, such as rites of passage which are less gendered in respect to societal opportunities, may be considered more legitimate.[123] Whilst Van den Brink and Tigcheelar concede that all four considerations as an approach makes a global policy less straightforward, it does make the application of a human rights frame "more universalist and less gender and culture biased", and that ultimately, what is important is not the blind comparison of male and female circumcision, but a reasoned consideration of whether they can be justified by human rights standards.[124]

Other scholars challenging the differential treatment between male circumcision and FGM, have proposed a similar approach. While Van den Brink and Tigcheelar's approach is based on evaluating the practices against a universal human rights framework, Earp's proposal is based on an ethical framework but with similar considerations of bodily autonomy and informed consent rather than sex and gender.[125] He suggests an approach where "the test of moral permissibility would rest not so much on considerations of sex or gender – according to which boys, compared to girls are treated less favourably– but more on considerations of informed consent, reflecting an underlying concern for the 'genital autonomy' of children".[126] This approach is similar to Dustin's, who argues for "the application of consistent principles of

[122] Marjolein Van den Brink and Jet Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human Rights 445.
[123] Ibid.
[124] Ibid.
[125] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 99.
[126] Ibid 100.

choice and the recognition of all non-therapeutic bodily modification as 'cultural'".[127] She asserts that the implication of such an approach would mean that non-therapeutic male circumcision on infant boys is unacceptable and that it is illegal to circumcise a girl under the age of consent.[128] She acknowledges that whilst this may not be a satisfactory position for all, the intention is to avoid "a double standard" while allowing social activism and education which changes the cultural attitudes that create and foster the continuation of these practices.[129]

2.7 Why FGM is Practised

For many, particularly in the West, the question why FGM is practised is a perplexing one. As an outsider, it can be difficult to fathom why families would subject their daughters to such a traumatic procedure with adverse health risks, and a risk of mortality. In response to this question, Gruenbaum, writer of *The Female Circumcision Controversy*, asserted: -

> There is no simple answer to this question. People have different and multiple reasons. Female circumcision is practiced by people of many ethnicities and various religious backgrounds, including Muslims, Christians, and Jews, as well as followers of traditional African religions. For some it is a rite of passage. For others it is not. Some

[127] Moira Dustin, 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies' (2010) 17 European Journal of Women's Studies 20.
[128] Ibid.
[129] Ibid.

consider it aesthetically pleasing. For others, it is mostly related to morality or sexuality.[130]

Despite all the different motivations and/or justifications given for FGM, the root cause for its perpetration and continuity across all practising communities is gender oppression: "It is a manifestation of gender inequality deeply entrenched in social, economic and political structures".[131] Another qualifying aspect of FGM is that it is typically entrenched as a sociocultural tradition, persisting due to familial and social pressure to conform and the threat of ostracization. The following are the common justifications for FGM.

2.7.1 Tradition

Tradition or custom is the most common justification for FGM.[132] Practising Muslim communities refer to the practice as *sunna*[133] which translates literally to tradition.[134] Proponents argue that it constitutes an essential part of the culture's tradition, carried out for thousands of years, "without which the culture itself would be unrecognisably altered".[135] Indeed, some women explain that, "It is a custom handed down to us by our grandfathers".[136] Long argues that often those who wish to preserve the practice are those who do not undergo

[130] Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (University of Pennsylvania Press 2000) 33.
[131] WHO, 'Eliminating Female Genital Mutilation: An Interagency Statement'
(16 June 2008) https://www.who.int/publications/i/item/9789241596442 accessed 10 July 2022.
[132] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) Culture in the Domains of Law (Cambridge University Press 2017) 86.
[133] Abdulrahim A Rouzi, 'Facts and controversies on female genital mutilation and Islam' (2013) 18 ESCRH 11.
[134] Sarah Long, 'Multiculturalism and Female Genital Mutilation' (2004) 1 UCL Jurisprudence Review 184.
[135] Ibid.
[136] A T Slack, 'Female Circumcision: A Critical Appraisal' (1988) 10 Human Rights Quarterly 448.

the procedure, that is, the men – fathers, husbands and grandfathers.[137] FGM is thus often perpetuated (and justified) as a means of preserving cultural identity. This justification bears challenging, not only because FGM is a harmful practice, but also because customs are not static, but fluid, evolving and adapting to the changing times.[138] This is true enough since at least 22 out of 28 practising African countries have outlawed FGM over the last two decades.[139] A great example of the tradition evolving is the adoption of "alternative rites of passage" an approach that has shown some success in some practising communities in Kenya.[140]

2.7.2 Rite of passage

FGM as a rite of passage is linked with communities where girls are circumcised at the onset of puberty. It marks the passage from childhood into womanhood. The initiation symbolizes sexual maturity, preparing girls for marriage. In the initiation ceremonies, young girls are taught by designated older women about "female hygiene, sexual life, and other life lessons they need".[141] The initiation has direct relevance to marriageability, as the initiate is deemed ready to become a wife and mother.[142] In Kenya, among the Maasai and Samburu ethnic groups, FGM and marriageability are strongly linked, and a girl is typically married off after

[137] Sarah Long, 'Multiculturalism and Female Genital Mutilation' (2004) 1 UCL Jurisprudence Review 184.
[138] Uma Narayan, 'Undoing the "Package Picture" of Cultures' (2002) 25(4) Signs 1083.
[139] 28 Too Many, https://www.28toomany.org/thematic/law-and-fgm/ accessed 29 May 2023.
[140] 28 Too Many, 'Country Profile: FGM in Kenya' (May 2013) https://www.28toomany.org/media/uploads/Country%20Research%20and%20Resources/Kenya/kenya_country_profile_v3_(july_2017).pdf accessed 24 September 2019.
[141] Maria Caterina La Barbera, 'Revisiting the Anti-Female Genital Mutilation Discourse' (2009) 9 Diritto & questioni pubbliche 490.
[142] Ibid 491.

circumcision.[143] With these semi-nomadic communities, a circumcised girl typically attracts a higher bride price than one who has not been cut.[144] The rite of passage is often a powerful motivation and/or source of pressure for girls to undergo FGM as it imparts "a sense of pride, a coming of age and a feeling of community membership".[145] Uncircumcised girls are often ridiculed and shunned, and are referred to by derogatory names that signify their inferior status. It is an offence in Kenya to use derogatory and abusive language on girls/women who have not undergone FGM punishable by six months imprisonment or a fine of not less than fifty thousand shillings.[146]

2.7.3 Marriageability

In many practising communities there is often an expectation that men will only marry girls/women who have undergone FGM.[147] This puts a lot of pressure on families to have their daughters circumcised for fear that no one will want to marry them. According to WHO, the issue of marriageability, which is perceived as "fulfilling local ideals of womanhood and femininity" and as essential for "economic and social security" may explain why the practice continues to endure.[148] Mothers and female relatives, despite being best placed to empathize – having undergone FGM themselves – are often proponents for the practice for this reason.[149]

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[143] 28 Too Many, 'Country Profile: FGM in Kenya' (May 2013) https://www.28toomany.org/media/uploads/Country%20Research%20and%20Resources/Kenya/kenya_country_profile_v3_(july_2017).pdf accessed 24 September 2019.
[144] Ibid.
[145] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 6.
[146] Prohibition of Female Genital Mutilation Act 2011, s 25.
[147] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 6; Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 87.
[148] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 6.
[149] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19 Feminism and the Law 945.

This is why it is important to include men in the discussion to end FGM, for many reasons, not least of which to stop the issue of marriageability becoming a self-fulfilling prophecy. However, whilst marriageability is indeed a reality for many girls facing FGM, this reasoning does assume that intermarriage between practising and non-practising communities does not happen. This is particularly relevant in the western context where practising groups are the minority. Long argues that this mentality presumes that marriage only occurs within the minority group yet it is possible and is in fact a reality that men from the majority culture may wish to marry a woman from the minority culture and vice versa.[150]

2.7.4 Religion

Religious requirement is often cited as a reason why FGM is practised in some communities. There is a widespread, albeit erroneous belief (according to mainstream clerical opinion), among some Muslim communities that FGM is a requirement of Islam.[151] However, as we have seen, FGM predates all major world religions and is also practised by Christians, Jews and "communities with animist or pantheistic beliefs".[152] Burrage asserts that FGM, "a long-established custom", has become "interconnected with questions of piety and faith" and this has caused confusion and disagreements between Muslim communities and scholars about the authenticity and legitimacy of FGM.[153] However, there is no mention of the practice in the Christian Bible, the Hebrew Bible (Tanakh) or the Quran.[154] Many religious leaders and

[150] Sarah Long, 'Multiculturalism and Female Genital Mutilation' (2004) 1 UCL Jurisprudence Review 183.
[151] Hilary Burrage*, Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 81.
[152] Ibid.
[153] Ibid 86.
[154] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 88.

scholars have spoken against FGM saying it is not prescribed by the Quran.[155] The Muslim Women's League state that "Islam is a religion that guarantees the integrity of the human being- both in body and in spirit. Female genital cutting violates that integrity, insulting Allah the creator whose creation needs no improvement".[156]

Burrage explains that FGM has over the centuries been especially evident in contexts where women are treated as the property of men, and that therefore, it has little to do with religious practice or doctrine, rather, it is a deeply rooted patriarchal tradition.[157] O'Neill is of a similar opinion holding that, elementally, FGM is the characterisation of women's perceived inferiority to men by men, a view that is not affiliated with religious belief, but one that is inextricably linked to "gender order hierarchical positioning".[158]

2.7.5 Sexuality and the control of women

This justification is closely related to marriageability. Some practising communities believe that FGM restrains a woman's sexual desire hence preventing immoral sexual behaviour[159], preserving her virginity for marriage and ensuring marital fidelity.[160] An exciser said, "[a] woman's role in life is to care for her children, keep house and cook. If she has not been cut,

[155] Abdulrahim A Rouzi, 'Facts and controversies on female genital mutilation and Islam' (2013) 18 ESCRH 11.
[156] Muslim Women's League, 'Female Genital Mutilation' (January 1999) http://www.mwlusa.org/topics/violence&harrassment/fgm.html accessed 1 June 2019.
[157] Hilary Burrage, *Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 81.
[158] Clayton Ó Néill, *Religion, Medicine and the Law* (Routledge 2019) 150.
[159] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19 Feminism and the Law 942.
[160] Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* (University of Pennsylvania Press 2000) 49; Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 89.

[she] might think about her own sexual pleasure".[161] Long argues that the greatest driving force of FGM is the domination of women by men – FGM is meant to rob them of their power so that they cannot challenge men; this is evident in the myth that the clitoris (presented as masculine organ) "must be cut down lest it should become erect like a penis and block intercourse".[162]

Whilst male dominance and gender inequality can be attributed to some of these justifications, some scholars caution that FGM is not always associated with the lower status of women and/or aimed at reducing sexual pleasure.[163] In some cultural contexts, women view the practice as "conducive to good hygiene, beautifying, empowering, and as a rite of passage with high cultural value" rather than the expression of patriarchal norms.[164] Aesthetics and sanitization are often strong justifications for the practice by women who support FGM.[165] Such a notion is challenged with the contention that these women are victims of a "false consciousness" and are so oppressed to the point of becoming "unwitting instruments to their own oppression".[166]

This contention is seen as being both "simplistic and condescending".[167] In this regard, Wade argues that attributing the continuation of FGM primarily to patriarchal norms is a gross

[161] Susan Moller Okin, 'Is Multiculturalism Bad for Women?' in Joshua Cohen et al (eds) *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 14.
[162] Sarah Long, 'Multiculturalism and Female Genital Mutilation' (2004) 1 UCL Jurisprudence Review 180.
[163] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 96.
[164] Ibid.
[165] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 88.
[166] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 96.
[167] Ibid.

oversimplification that does not take into account the complex interplay of other social, cultural and economic factors in these diverse societies.[168] Moreover, as Earp opines, it is also possible that women who are proponents of FGM "possess a comparatively narrow degree of awareness of the key issues, such as the relevant genital anatomy, the ethical controversies surrounding the practice, the way it is perceived in other societies, and so on".[169] It is therefore necessary to educate communities and thus empower girls and women with such knowledge, for the fight against FGM to be effective. There is evidence (in Nigeria) that "an increase in parental education corresponds to a reduction in the likelihood that the daughter will be "circumcised," although in other contexts, an increase in parental education corresponds, not to the abandonment of FGM, but rather to its medicalization".[170]

2.8 Consequences of FGM

FGM is associated with a series of adverse physical and psychological risks. The extent of the harm depends on the type of FGM performed and the conditions under which it was performed, that is, whether the procedure was done in a medical setting or by traditional excisers. Data has also shown that 18% of girls who have undergone FGM have had the procedure done by a healthcare provider.[171] Often, however, FGM will be performed by traditional excisers with no surgical training in non-sterile environments using instruments

[168] Lisa Wade, 'Learning from "Female Genital Mutilation": Lessons from 30 Years of Academic Discourse' (2012) 12 Ethnicities 28.
[169] Brian D Earp, 'Female genital mutilation and male circumcision: toward an autonomy-based ethical framework' (2015) 5 Medicolegal and Bioethics 96.
[170] John C Caldwell, I O Orubuloye and Pat Caldwell, 'Male and female circumcision in Africa from a regional to a specific Nigerian examination' (1997) 44 Social Science and Medicine 1181–1193.
[171] WHO, Global strategy to stop health-care providers from performing female genital mutilation (2010) 3.

such as knives, razor blades or glass; no anaesthetic is used, and female relatives usually hold down the girls.[172]

The immediate complications of FGM may include severe pain, injury to the adjacent tissue of urethra, vagina, perineum and rectum, haemorrhage, shock, acute urine retention and infections such as urinary tract infection, HIV and hepatitis B, septicaemia, gangrene and tetanus; many of these outcomes will result in death.[173] Long-term complications are more often associated with infibulation than with clitoridectomy alone, due to interference with the flow of menstrual blood and urine.[174] They may include, difficulty in passing urine, pelvic infections, infertility, keloid scar, cysts and abscesses on the vulva, difficulties in menstruation, fistulae, painful sexual intercourse and problems in child birth.[175]

Whilst there are not many studies on the psychological impact of FGM, there is evidence that FGM does inflict significant psychological harm on girls and women. Behrendt and Moritz investigated the psychological impact of FGM on 23 Senegalese women in Dakar through a study that compared them to 24 uncircumcised women. The study revealed a higher prevalence of post-traumatic stress disorder (PTSD) at 30.4% in the women who had undergone FGM and other psychiatric syndromes such as memory problems at 47.9%.[176] Knipscheer et al conducted a study of the mental health status of 66 immigrant women who had undergone FGM, finding that a third of the women scored above the cut-off for

[172] Comfort Momoh (ed) *Female Genital Mutilation* (CRC Press 2005) 22.
[173] WHO, Female Genital Mutilation: Integrating the Prevention and the Management of the Health Complications into the curricula of nursing and midwifery (2001) 29.
[174] Nahid Toubia, 'Female Circumcision as a Public Health Issue' (1994) 331 The New England Journal of Medicine 713.
[175] Ibid.
[176] Alice Behrendt and Steffen Moritz, 'Posttraumatic Stress Disorder and Memory Problems After Female Genital Mutilation' (2005) 162 AM J Psychiatry 1000.

depression and anxiety disorders and 17.5% for PTSD.[177] The study revealed that the "type of circumcision, country of origin, source of income, vividness of recollection and coping style were significant factors in a multivariate context concerning mental health symptoms".[178] Reisel and Creighton observe that more research is required into the psychological and psychosexual effects of FGM as well as an assessment of intervention strategies.[179]

2.9 Conclusion

The foregoing discussion demonstrates that the phenomenon of FGM is an extremely complex one, and that a nuanced multidimensional perspective is necessary if it is to be adequately understood for the purposes of academic analysis or indeed fruitful debate. This overview of the reality of FGM provides a necessary foundation for the exploration with subsequent chapters of its treatment within legal frameworks (at national and international levels) and within the Mediums of France and England.

[177] Knipscheer et al, 'Mental health problems associated with female genital mutilation' (2015) 39 BJPsych Bulletin 275.
[178] Ibid.
[179] Reisel and Creighton, 'Long term health consequences of Female Genital Mutilation' (2015) 80 Maturitas 51.

CHAPTER THREE – INTERNATIONAL AND NATIONAL RESPONSES TO FGM

3.1 Introduction

Legal frameworks are a core concern of this thesis. They are of course important in the analysis of the primary research question as to why France has achieved far higher prosecution rates for FGM than England. However, they are also of profound importance when it comes to understanding and embodying the Medium in each context. Laws do not simply draw boundaries around the acceptable limits of behaviour, although this is clearly a vital function, especially when we are considering effective strategies for protecting the human rights of the vulnerable. In addition to this restraining function, laws express positive ideas and values, and reflect the priorities and norms of the communities which promulgate and apply them. For both of these reasons, it is vital that we examine the treatment of FGM within both domestic and international law.

In this era, FGM is internationally recognised as a crime and a human rights violation. It is reported that 22 out of 28 countries where the practice is traditional, have enacted laws banning it.[180] Furthermore, it is prohibited in France and England and many other western nations. Yet while FGM has existed for eons – predating all Abrahamic religions[181] – it only attracted serious attention in global human rights discourse from the 1950s onwards. It was

[180] 28 Too Many, 'Law and FGM: Key Findings' https://www.28toomany.org/thematic/law-and-fgm/ accessed 20 February 2021.
[181] Hilary Burrage, *Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 81.

at this point that international legal frameworks began to address the practice. This chapter charts the legal trajectory of FGM, first at international then at state level. The latter part of the discussion focuses specifically on France and England's law and policy framework on FGM, shedding light on the respective Mediums and the way in which their outworkings have translated into practical action.

3.2 The Historical Development of an International Human Rights Framework Addressing FGM

The earliest documented efforts to bring attention to female circumcision date back to the early 1900s.[182] These early attempts at eradication came about as a result of British colonialists in Africa who "instituted a low level campaign" against so-called female circumcision, and the influx of Christian missionaries who "incorporated a message against female circumcision into their medical education programs".[183] It is however believed that prior to this, there may have been undocumented efforts to stop the practice by local populations.[184] In fact, according to Obiora, Africans were starting to realize its harmful consequences, but their "favourable disposition to change" was hindered by the "antagonistic intervention of the missions".[185]

[182] Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 9.
[183] Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 Law & Ineq 375.
[184] Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 9.
[185] Leslye Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 331.

The unwelcome intervention by foreigners on a culturally significant tradition provoked anger and resentment within local populations. In Kenya, this externally imposed attempt at eradication banished the practice to the realm of secrecy thereby "redefining its significance" and it became "a symbol of the nationalistic resistance" against colonialism.[186] It is reported that whilst missionary education resulted in fewer infibulations in Kenya, the infibulations were replaced with excision which in comparison is a lesser form of FGM.[187]

Eradication attempts were discontinued by British colonial administrators and missionaries in the 1940s and 1950s, meaning that FGM was not a prominent concern in the West until the 1970s when it attracted the attention of US feminist writers.[188] In that period, there was some resistance within the international community to intervene (although as noted above dialogue was opening up in the international fora) as FGM was considered to be a "private" issue perpetrated by individuals rather than by state actors and this "precluded FGM from being viewed as a legitimate human rights concern".[189] There was also fear that imposing universal human rights ethos on a deeply rooted tradition would be perceived as cultural imperialism.[190]

As previously stated, the UN first placed female circumcision on the international human rights agenda in the early 1950s. Bodies within its auspices such as the Commission on the Status of Women (CSW) began to focus on "the problem of customs, ancient laws and

[186] Leslye Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 330.
[187] Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 Law & Ineq 375.
[188] Ibid 376.
[189] Amnesty International, *Female Genital Mutilation: A Human Rights Issue*, (AI Index: ACT 77/012/1997) 1.
[190] Ibid. See section 4.6 for a discussion on the conflict between cultural relativism and human rights.

practices that were harmful to the health and well-being of women and girls".[191] In May 1952, acting on the recommendation of the CSW, the Economic and Social Council called upon Member States, to: -

> Take immediately all necessary measures with a view to abolishing progressively... all customs which violate the physical integrity of women, and which thereby violate the dignity and worth of the human person as proclaimed in the Charter and in the Universal Declaration of Human Rights.[192]

In 1958, upon the Commission's urging on the issue of traditional practices affecting young girls, the Economic and Social Council requested WHO to undertake a study on ritual operations affecting young girls to which WHO responded that the practice in question (FGM) "involved social and cultural elements whose study was beyond its sphere of competence".[193] It appears then that the reluctance to intervene was rooted in two distinct but related issues – cultural imperialism and lack of expertise/competence – both leading to inaction. Despite recognition by the UN that female circumcision was a violation of the physical integrity of women, the response by WHO showed a continuing unwillingness to take decisive steps against FGM and the issue was yet again put aside for nearly two decades. It is important to note that whilst international action waned, indigenous African activism developed in the

[191] UN, *The United Nations and The Advancement of Women 1945-1996* (Vol VI, United Nations Publications 1996) 22, para 84.
[192] Ibid para 86.
[193] Ibid para 89.

1960s and 1970s with women's groups in many countries leading campaigns to educate communities about the harmful consequences of the practice.[194]

In 1972, preceding the UN Decade for Women (1975-1985), the CSW agreed to push for an anti-discrimination convention for women.[195] After years of deliberations, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was finally adopted by the General Assembly on 18 December 1979.[196] This was pivotal in the struggle for women's rights as it was the first international legal instrument to comprehensively bring together "internationally accepted principles on the rights of all women" worldwide.[197] Under the Convention, governments were not only required to intervene to end discrimination against women in the public sphere, but also in private life.[198] This was a unique feature of the document as it came at a time when the main focus of international human rights was on the public domain rather than the private sphere, yet a significant number of violations of women's rights occur within domestic settings.[199] As will be discussed in later chapters, the neglect of the private sphere and the interplay between culture and gender in that space, is particularly contentious in the context of multiculturalism. Some feminists argue that multiculturalists advocating for group rights pay little to no attention to gender roles in cultures or within the private sphere.[200]

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[194]Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 10.
[195] UN, *The United Nations and The Advancement of Women 1945-1996* (Vol VI, United Nations Publications 1996) 40, para 158.
[196] Ibid 41, para 163.
[197] Ibid 41, para 164.
[198] Ibid 42, para 166.
[199] Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 11.
[200] See, for example, Susan M Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999); Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108 (4) Ethics 679.

In 1979, the WHO sponsored a seminar in Khartoum, Sudan on Harmful Traditional Practices Affecting the Health of Women and Children.[201] During this event, women from several African countries voted against a suggestion from medical participants for a milder form of the practice to be performed in hygienic conditions, and led a vote to end all forms of the practice.[202] In the 1980s, there was collision between African women activists and western feminists. Whilst the scholarly works of western feminists which questioned the "lack of a gender lens on the law and human rights" is said to have been critical to later efforts to frame FGM as a human rights violation, the refusal of some western feminists to acknowledge the need for cultural sensitivity when discussing FGM led to conflict.[203] Many African women resented labels like "barbaric" being applied to aspects of their cultural heritage, especially in light of centuries of denigration of cultures from the African continent.[204] It is reported that during an NGO panel discussion at the 1980 UN Mid-Decade Conference on Women, African women activists felt that some western women who spoke against the practice were condescending and confrontational.[205]

In tackling the question of cultural sensitivity, western feminists on the other side of the debate maintained that this was a device used by the male leaders of practicing countries "to maintain their supremacy over women" and that believing the cultural myths about female

[201] UN, *The United Nations and The Advancement of Women 1945-1996* (Vol VI, United Nations Publications 1996) 24, para 90.
[202] Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 10.
[203] Ibid 11.
[204] Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 Law & Ineq 379.
[205] Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 10.

circumcision erases the truth that it is done for male domination.[206] Despite the conflict[207], Brennan observes that African women were nonetheless influenced by the global movement advocating for women's rights.[208] African feminists were publishing literature echoing the sentiments of western feminists – that the practice was a "violation of their physical integrity and dignity".[209] Brennan avers that this led to considerable opposition against female circumcision in the early 1980s which included both Africans and foreigners, and a consensus was reached among the two groups in which foreigners were to provide financial and technical assistance and refrain from criticism.[210]

In 1984, a group of women activists convened a meeting of African NGOs in Senegal, for the Dakar International Seminar on Traditional Practices that Affect the Health of Mothers and Children.[211] The seminar resulted in the formation of the Inter-African Committee on Traditional Practices that Affect the Health of Mothers and Children (IAC) and subsequently over a period of 15 years, IAC affiliates were founded in over 26 African countries with the mandate of educating national governments and the public about the harmful effects of FGM.[212]

[206]Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 Law & Ineq 377.
[207] L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 328.
[208] Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7 Law & Ineq 379.
[209] Ibid 377.
[210] Ibid 379.
[211] Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 10.
[212] Ibid.

In 1990, the Committee responsible for the implementation of CEDAW issued a general recommendation on FGM urging member states to take measures such as the support of women's organizations working to eliminate FGM and to promote education and research on the effects of FGM.[213] In 1992, female circumcision was named as "a traditional practice perpetuated by culture and tradition that was harmful to the health of women and children".[214] In 1993, the UN General Assembly passed a resolution on the Declaration on the Elimination of Violence against Women in which FGM was included within the definition of what encompasses "violence against women".[215] Since then the position that FGM is a women's rights violation has been reinforced internationally at a series of key conferences, including but not limited to, the 1993 UN World Conference on Human Rights in Vienna, the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing, plus its follow-up events in 2000 and 2005 in New York, Beijing +5 and Beijing +10 respectively.[216]

3.3 International Human Rights Instruments Relevant to FGM

Within the international human rights framework, FGM is primarily addressed under two instruments: the 1979 Convention on the Elimination of All Forms of Discrimination Against

[213] UN Committee on the Elimination of Discrimination Against Women, 'General recommendation No 14' in 'General recommendations made by the Committee on the Elimination of Discrimination against Women' (1990) UN Doc A/45/38.
[214] UN Committee on the Elimination of Discrimination Against Women, 'General recommendation No 19' in 'General recommendations made by the Committee on the Elimination of Discrimination against Women' (1992) UN Doc A/47/38.
[215] UNGA Res 48/104 (23 February 1994) UN Doc A/RES/48/104.
[216] UNICEF, Changing a Harmful Social Convention: Female Genital Mutilation, (UNICEF Innocenti Digest 2005) 16.

Women (CEDAW) and the 1989 UN Convention on the Rights of the Child (UNCRC/CRC). CEDAW requires states to "take measures to abolish customs and practices which constitute discrimination against women"[217] ; and to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".[218] The UNCRC dictates that member states have an obligation "to take all measures to abolish traditional practices prejudicial to the health of children".[219]

Other than the UNCRC and CEDAW, there are several key human rights instruments that contain articles relevant to FGM. These instruments do not expressly mention FGM, hence the practice ought to be "interpreted within the scope of a broadly termed right,"[220] within the instruments, such as freedom from torture or cruel, inhuman or degrading treatment, the right to life, liberty and security of the person. These treaties include: the 1948 Universal Declaration of Human Rights (UDHR) (articles 2 and 3), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1966 International Covenant on Civil and Political Rights (ICCPR) (articles 7 and 24) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (article 12).[221]

[217] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 34 UNTS 180 (CEDAW) art 2.
[218] Ibid art 5.
[219] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 44 UNTS 25 (UNCRC) art 24.
[220] Anika Rahman and Nahid Toubia (eds), *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books 2000) 19.
[221] UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation* (UNICEF Innocenti Digest 2005) 20.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has stated in its general comments on the right to health (article 12) that it is "important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights"; and to "adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation…".[222] Other regional human rights instruments relevant to FGM include, the 1981 African Charter on Human and Peoples' Rights (article 16); the 1990 African Charter on the Rights and Welfare of the Child (article 21); the 2003 Protocol on the Rights of Women in Africa (article 5); and the 2004 African Union: Solemn Declaration on Gender Equality in Africa.

3.4 The Human Rights of Girls and Women Violated by FGM

The international human rights instruments discussed above, protect a number of fundamental interests which are violated by the practice of FGM.

a) **The Right to be Free from Gender Discrimination**

Article 1 of CEDAW defines discrimination against women as: -

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human

[222] UNCESCR 'General Comment 14' in 'Right to the Highest Attainable Standard of Health: Art 12 of the Covenant' (2000) UN Doc E/C.12/2000/4.

rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[223]

FGM fits within the definition of gender discrimination as it is underpinned by the discriminatory belief that girls and women play a subordinate role to men in society; it therefore reflects deeply-rooted inequality between the sexes.[224] In this regard, Khosla asserts that the practice of FGM promotes "gender norms and stereotypes" which violate human rights.[225] The prohibition against gender discrimination is supported by various human rights instruments such as UDHR (Article 2), ICCPR (Articles 2, 3 and 26), the ICESCR (Articles 2 and 3), CEDAW (Articles 1, 2 and 5), the UNCRC (Article 2) and the Banjul Charter (Articles 18 and 28).[226]

b) **The Right to Life**

In the most extreme cases, FGM has resulted in death[227], robbing girls of the inviolable right to life. FGM is also associated with increased rates of maternal and neonatal mortality as it may cause complications for both mother and child during delivery.[228] The right to life is enshrined in a number of human rights instruments. Article 3 of the UDHR, article 6 of the

[223] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 34 UNTS 180 (CEDAW) art 1.
[224] UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (2014) para 4.1.
[225] Rajat Khosla et al, 'Gender equality and human rights approaches to female genital mutilation: a review of international human rights norms and standards' (2017) 14(59) Reproductive Rights 3.
[226] UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (2014) para 4.1.
[227] See the excision cases discussed in section 5.7 – the cases of Doua, Bobo and Mantessa.
[228] UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (2014) para 4.2.

ICCPR, article 6 of the UNCRC and article 4 of the Banjul Charter and if it is not protected, all other rights are rendered nugatory.

c) **The Right to Physical and Mental Integrity Including Freedom from Violence**

The right to physical integrity is protected under article 1 of the UDHR, article 9 of the ICCPR, article 19 of the UNCRC and articles 4 and 5 of the Banjul Charter. There are several human rights associated with physical integrity that FGM violates; the inherent dignity of the person, the right to liberty and security of the person, and the right to privacy.[229] FGM may cause partial or total loss of sexual function which "constitutes a violation of a woman's right to physical integrity and mental health".[230] The CESCR has made specific reference to FGM as a violation of the right and physical integrity of girls and women.[231] A girl is deprived of her liberty and security when she is forcibly held down and restrained during the procedure.[232] Since FGM is concerned with the most intimate parts of a woman's body, it violates her right to privacy and restricts her personal freedom to determine her sexual and emotional life as well as personal development.[233]

d) **The Right to the Highest Attainable Standard of Health**

FGM invariably causes short-term and/or long-term harmful effects on a girl's/woman's physical and mental health. This is a violation of the right to the highest attainable standard

[229] UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (2014) para 4.2.
[230] Ibid.
[231] Rajat Khosla et al, 'Gender equality and human rights approaches to female genital mutilation: a review of international human rights norms and standards' (2017) 14(59) Reproductive Rights 6.
[232] UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (2014) para 4.2.
[233] Ibid.

of health, which is enshrined in article 25 of the UDHR, article 12 of the ICESCR, article 24 of the UNCRC, article 12 of CEDAW and article 16 of the Banjul Charter.[234]

e) **The Right Not to be Subjected to Torture or Inhuman or Degrading Treatment or Punishment**

Article 1, paragraph 1 of Convention Against Torture defines torture as: -

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[235]

FGM meets the above criteria as it constitutes gender discrimination and whilst it is typically considered a 'women's issue' it is nonetheless done with the implicit knowledge of leaders within the communities it is practiced. According to the 2008 Report of the UN Special Rapporteur on torture, "FGM can amount to torture if States fail to act with due diligence to protect, prevent, investigate and, in accordance with national legislation, punish FGM".[236] In this regard, both the UN Special Rapporteur on violence against women and the UN Special

[234] Ibid para 4.4.
[235] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 39 UNTS 46 (CAT) art 1.
[236] UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (2014) para 4.5.

Rapporteur on torture recognize that FGM can amount to torture under CAT.[237] In international law, the right to be free from torture is considered to be *jus cogens*, a norm that cannot be derogated from whether or not the contravening state is a party to the international instrument.[238] Further, human rights instruments do not allow individuals to consent to torture no matter the circumstances. This right is enshrined in article 5 of the UDHR, article 7 of the ICCPR, article 37 and 39 of the UNCRC and article 5 of the Banjul Charter.

f) **The Rights of the Child**

FGM is commonly performed on girls from birth up to the age of puberty hence it is regarded in the international community as a violation of the rights of the child.[239] FGM is a form of child abuse. The UNCRC is one of the most widely ratified international treaties. Fundamental to the UNCRC is the principle that the best interests of the child shall be a primary consideration (Article 3) and FGM is a gross violation of this principle.[240] Of note is that the concept of "best interests" is perceived differently by proponents and opponents of FGM, parents often believe that it is in their daughters best interests to undergo the procedure for the reasons outlined in section 2.7 above; this demonstrates the conflict between cultural relativism and universal human rights as will be discussed in forthcoming chapter.[241] Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC) echoes this. Article 24

[237] UNCHR 'Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (1986) UN Doc E/CN.4/1986/15 para 38; UNCHR 'Report of the Special Rapporteur on violence against women, its causes and consequences' (2002) UN Doc E/CN.4/2002/83 para 6; UNCHR 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2008) UN Doc A/HRC/7/3 paras 50-54.
[238] UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (2014) para 4.5.
[239] Ibid para 4.6.
[240] Rajat Khosla et al, 'Gender equality and human rights approaches to female genital mutilation: a review of international human rights norms and standards' (2017) 14(59) Reproductive Rights 3.
[241] See the discussion in section 4.6.

of the UNCRC and Article 21 of the ACRWC address traditional practices harmful to the health of the child. FGM violates several children's rights protected under the UNCRC and ACRWC, such as "the right to be free from discrimination (Article 2 of the UNCRC and Article 3 of the ACRWC) the right to be protected from all forms of mental and physical violence and maltreatment (Articles 16 and 19 of the UNCRC and Article 10 of the ACRWC), the right to the highest attainable standard of health (Article 24 of the UNCRC and Article 14 of the ACRWC), freedom from torture or other cruel, inhuman or degrading treatment or punishment (Article 37 of the UNCRC and Article 16 of the ACRWC) and the right to life (Article 6 of the UNCRC and Article 5 of the ACRWC)". [242]

3.5 UK's Human Rights Framework Relevant to FGM

The United Kingdom has ratified the foregoing international conventions including the regional European treaties (discussed below) which are relevant to FGM. It is important to note that while the treaties are legally binding on the international plane, they are not enforceable in UK courts because of the UK's dualist approach to international law. For these treaties to be enforceable within the UK's legal order they must be enacted within domestic legislation.[243] Courts may take the content of international treaties into account in their deliberations, but unless they have been enshrined within statute or other instruments, they do not have force of law, and do not enable individuals to bring claims in the absence of a pre-existing course of action. The European Convention on Human Rights (ECHR), for instance,

[242] UNFPA, Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation (2014) para 4.6.
[243] European Parliament Briefing, Jurisdiction upon and after the UK's withdrawal: The perspective from the UK Constitutional Order (Policy Department for Citizens' Rights and Constitutional Affairs 2018, PE 596.831); Lord Mance, 'International Law in the UK Supreme Court' (London: King's College 2017).

only became directly enforceable within the UK jurisdiction via the Human Rights Act 1998 (HRA): "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights".[244]

Articles 2 (the right to life), 3 (the right not to be subjected to torture or to inhuman or degrading treatment or punishment) and 8 (the right to respect for a private and family life) of the ECHR can be interpreted to protect against FGM. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, established the European Committee for the Prevention of Torture (CPT), whose mandate (Article 1) is to conduct visits to "examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment".[245] Articles 1, 2, 3, 4, 6, 7, 21 and 24 of the Charter of Fundamental Rights of the European Union are also relevant to protection against FGM.[246]

3.6 Positive Obligations

By ratifying all these treaties, the UK has made international law commitments to prevent the practice of FGM within its jurisdiction. Compliance with these obligations requires the UK to create an effective anti-FGM mechanism that operates in a "multi-level and multi-agency manner" as well as maintaining a "proactive commitment" to protect girls in the UK against

[244] Human Rights Act 1998, introductory text.
[245] Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (26 November 1987) ETS 126.
[246] Charter of Fundamental Rights of the European Union, 2012/C 326/02. Art 1 – human dignity, Art 2 – right to life, Art 3 – right to the integrity of the person, Art 4 – prohibition against torture and Inhuman or degrading Treatment or punishment, Art 6 – right to liberty and security, Art 7 – respect for private and family life, Art 21 – non-discrimination, Art 24 – the rights of the child.

FGM.[247] Common to all the treaties, is that member states are required to undertake legislative, administrative, judicial and/or other measures for the implementation of the rights recognized in the conventions. CEDAW imposes an obligation on member states to pursue all appropriate means to eliminate discrimination against women. FGM constitutes a grave form of discrimination against women and girls and thus by ratifying CEDAW, the UK is committed to eliminating FGM within its borders.

By virtue of Article 24 of the UNCRC, the UK has a positive obligation in international law to take measures to abolish traditional practices harmful to the health of children; and in Article 37 to ensure children are not subject to cruel, inhuman and degrading treatment. The Bar Human Rights Committee has stated that FGM constitutes an irreparable violation of the child's bodily integrity and physical and psychological health.[248]

The UK also has a positive obligation to undertake measures to prevent acts of torture within its jurisdiction.[249] CAT made it clear that where state authorities are aware that acts of torture or ill-treatment such as FGM are being committed by non-state and private actors, and the state fails to exercise due diligence to prevent, protect and prosecute such actors, the state will be complicit under the Convention for "consenting to or acquiescing in such impermissible acts".[250] In the Committee's General Comment No. 2, it identified FGM as a form of gender-based violence which falls within the ambit of the prohibition against torture and other cruel,

[247] Zimran Samuel, *Female Genital Mutilation Law and Practice* (LexisNexis 2017) 27.
[248] Bar Human Rights Committee, *Report of the Bar Human Rights Committee of England and Wales to the Parliamentary Inquiry into Female Genital Mutilation* (2014) para 12.
[249] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 39 UNTS 46 (CAT) art 2.
[250] CAT 'General Comment No 2' in 'Implementation of Article 2 by States Parties' (2008) CAT/C/GC/2.

inhuman or degrading treatment. Moreover, (under the ECHR as brought into UK law by the HRA) the UK is under positive obligations to ensure the protection of the rights contained in the Convention. In particular, Article 1 ECHR requires contracting states to "secure to all those within their jurisdiction the rights and freedoms" set out therein.[251]

3.7 FGM Law in England

Signatories to the foregoing accords should not only undertake measures to meet their legal obligations under the treaties, but also ensure that these are effective. On the legislative front, FGM was expressly criminalised in 1985 (prior to this, the practice was in any event an unlawful assault, as it was never within the category of assaults to which operative consent might be given) when the UK-wide Prohibition of Female Circumcision Act was passed (1985 Act). Having looked at the historical timeline of when FGM came to the attention of the international community, it is not unreasonable to suggest that the dynamics in the international plane contributed to passing the law. Section 1 made it an offence to "excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person".[252] Before 1985, FGM was not a specific criminal offence but, as noted above, it was unlawful and prosecutable under generic legislative provisions. A perpetrator could have been convicted under the Offences Against the Person Act 1861 (OAPA) for assault and/or grievous bodily harm under sections 47, 20 and 18. Furthermore, section 1(1) of the Children and Young Persons Act 1933 could be invoked if FGM was performed on a girl under 16 years, since it is an offence under the provision for a person over

[251] See for example, *X and Y v Netherlands* (1989) 8 EHRR 235; *Osman v UK* (2000) 29 EHRR 245.
[252] Prohibition of Female Circumcision Act 1985, s 1(1) (a).

the age of 16 to "cause or procure a child to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him unnecessary suffering or injury to health".[253]

The 1985 Act was repealed in 2003 by the Female Genital Mutilation Act (2003 Act) which increased the maximum sentence from 5 years in prison to 14 years. The 2003 Act applies to England, Wales and Northern Ireland (save for sections 5B and 5C). In 2015, the Serious Crime Act amended the 2003 Act to include: extra-territorial jurisdiction, an offence of failing to protect a girl from the risk of FGM, FGM protection orders (FGMPOs), lifelong anonymity for victims and a mandatory reporting duty for professionals in regulated professions.[254]

There are civil law provisions that are applicable to protection against FGM. Section 47 of the Children Act 1989 (1989 Act) imposes a duty on local authorities to investigate where it is suspected that a child is suffering or at risk of suffering significant harm. FGM can be reasonably classified as a cause of significant harm to a child. The Home Office 2018 policy guidance on safeguarding children, recognises FGM as a form of abuse which falls under section 47 of the 1989 Act.[255] The guidance places the onus on local authorities to develop local protocols for assessment that set out clear arrangements for case management once a child is referred into the local authority's social care, noting that some children, such as those at risk of FGM will require particular care.[256] In 2019, the Children Act 1989 (Amendment) (Female Genital Mutilation) Act was passed. The effect of the statute is to amend the 1989

[253] Children and Young Persons Act 1933, s 1(1); Ruth Gaffney-Rhys, 'From the Offences Against the Person Act 1861 to the Serious Crime Act 2015 - the development of the law relating to female genital mutilation in England and Wales' (2017) 39 J Soc Welf Fam Law 421.
[254] Serious Crime Act 2015, s 70-74.
[255] Home Office, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (2018) 21.
[256] Ibid 24-25.

Act so that proceedings under Section 5A and Schedule 2 of the 2003 Act – the FGMPOs – are family proceedings.

3.8 England's policy framework on FGM

In 2011, the Home Office published an Action Plan (2011-2015) to end violence against women and girls.[257] The Action Plan recognised the need for community involvement in tackling FGM and pledged support and facilitation of community engagement work.[258] It also recognised the need to develop learning programmes for the police on FGM to provide them with the tools to respond effectively to call-outs relating to FGM.[259] The Action Plan included a plan to develop guidelines for the Crown Prosecution Service (CPS) to support prosecutors dealing with potential cases of FGM, which was later published in June 2011. In 2022, the government published "Tackling Domestic Abuse Plan" which reported that the Ministry of Justice (MOJ) had been conducting a pilot to test a new notification process for FGMPOs which had proven successful in increasing police awareness of the orders, and the MOJ was considering making it permanent.[260]

According to Brown and Porter, there has been a "raft of policy developments" surrounding the new 2015 provisions which has led to the development of "local statutory responses and

[257] GOV.UK, 'Call to end violence against women and girls: action plan' (Home Office policy paper, 8 March 2011) https://www.gov.uk/government/publications/call-to-end-violence-against-women-and-girls-action-plan accessed 11 March 2020.
[258] Ibid para 17.
[259] Ibid para 34.
[260] Secretary of State for the Home Department, *Tackling Domestic Abuse Plan* (HM Government CP 639, 2022) 43.

models of joint working".[261] Whilst this is a positive development, Porter observes that it has exposed certain gaps in the support needed to roll out these policies, particularly in the training of frontline professionals so that they have the confidence and skill to respond appropriately.[262]

3.9 A Lack of Prosecutions in England

Since FGM was criminalized in 1985, there have been only four prosecutions with one (the first) conviction in 2019.[263] The Bar Human Rights Committee has stated that passing anti-FGM legislation remains insufficient if implementation is not effective.[264] For the law to be effective, other measures are necessary such as engaging with practising communities with the view of anti-FGM sensitization and education, and having effective FGM reporting mechanisms for frontline professionals.

In respect to the lack of prosecutions, the Bar Human Rights Committee identified ten critical respects in which the UK has failed, some key ones include: "(1) adequate education about FGM for boys and girls as part of the National Curriculum; (2) sufficient training of professionals in risk awareness, the law and survivor support; (3) effective and mandatory professional referral systems among regulated services (health, social services, education); (4)

[261] Eleanor Brown and Chelsey Porter, 'The Tackling FGM Initiative: Evaluation of the Second Phase (2013-2016)' (2016) Options Consultancy Services Ltd 13.
[262] Eleanor Brown and Chelsey Porter, 'The Tackling FGM Initiative: Evaluation of the Second Phase (2013-2016)' (2016) Options Consultancy Services Ltd.
[263] *R v N* (Female Genital Mutilation) 2019 WL 01116252 (2019).
[264] Bar Human Rights Committee, *Report of the Bar Human Rights Committee of England and Wales to the Parliamentary Inquiry into Female Genital Mutilation* (2014) para 14.

sufficient community engagement programmes directed at modifying attitudes to FGM and behaviour in practising communities; (5) appropriate monitoring of intervention effectiveness".[265] Echoing this, Dustin avers that the lack of prosecutions can be attributed to government's failure to combine legislation with campaigns within practising communities, to raise awareness on the illegality of FGM, and a failure to provide comprehensive guidelines for frontline professionals in health, education and social work.[266]

Even after the 2003 Act came into force, there were no successful prosecutions (until 2019) and as with the original legislation, NGO's claimed that the new law was not backed with adequate funding for community engagement.[267] Community engagement as a means of curbing FGM is indeed paramount. Evidence suggests that there are significant gaps in the understanding of the law, with a number women and men from practising communities being unaware that FGM is illegal and that it poses significant health risks.[268] The government's multi-agency statutory guidance on FGM highlighted the importance of working with communities and community based organisations (CBOs).[269] For instance, the mandatory reporting of FGM stipulated by the Serious Crime Act amendment of the 2003 Act, is said to be a "controversial and complex issue" which requires the mediatory role that CBOs play between statutory bodies and communities.[270]

[265] Bar Human Rights Committee, *Report of the Bar Human Rights Committee of England and Wales to the Parliamentary Inquiry into Female Genital Mutilation* (2014) para 28.
[266] Moira Dustin, 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies' (2010) 17 European Journal of Women's Studies 16.
[267] Ibid 17.
[268] Pollyanna Cohen et al, 'The Reality of FGM in the UK' (2018) 103 Arch Dis Child 305.
[269] Home Office, *Multi-agency statutory guidance on female genital mutilation* (2016) 31.
[270] Eleanor Brown and Chelsey Porter, 'The Tackling FGM Initiative: Evaluation of the Second Phase (2013-2016)' (2016) Options Consultancy Services Limited, London 13.

In summary, although there has been little success with prosecution, it is important to highlight that in comparison, there has been considerable progress with the FGMPOs. Since their introduction in July 2015, there have been a total of 539 applications for FGM protection orders and 764 orders made up to the end of June 2022.[271] The purpose of an FGMPO as is stipulated in Part 1 of Schedule 2 to the 2003 Act, is to offer civil injunctive protection for girls at risk of FGM and to protect girls against whom such an offence has been committed.[272] Gaffney-Rhys avers that it is impossible to gauge the deterring effect of the existence of the 2003 Act, questioning whether applications for FGMPOs would be made if FGM was not a criminal offence.[273] She nonetheless asserts that whilst the criminal law has been largely unsuccessful in prosecutions, it does support civil law provisions which have proven effective in protecting girls against FGM.[274] She states that with every FGMPO prohibiting the removal of a girl from the jurisdiction, the risk of FGM has been minimised; and thereby the courts have fulfilled the state's obligation to take reasonable and effective measures to prevent a violation of article 3 of the ECHR.[275]

[271] GOV.UK, 'Family Court Statistics Quarterly: April to June 2022' (Ministry of Justice, 12 October 2022) https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2019 accessed 9 December 2022.
[272] Zimran Samuel, *Female Genital Mutilation Law, and Practice* (LexisNexis 2017) 61.
[273] Ruth Gaffney-Rhys, 'Recent cases relating to female genital mutilation' (2018) Family Law 1163.
[274] Ibid.
[275] Ibid.

3.10 France's Human Rights Framework Relevant to FGM

France has ratified several international human rights instruments relevant to ending and preventing FGM. Some of the treaties and their applicable articles have been mentioned and discussed in the foregoing sections. They include the UDHR, CEDAW, UNCRC, CAT, ECHR, the Istanbul Convention and the Charter for Fundamental Rights of the European Union.[276] France therefore has positive obligations under international law to take effective measures to prevent FGM within its borders. For instance, Article 5 of the Istanbul Convention requires member states to "exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors".[277]

Unlike most other treaties whereby FGM is interpreted within other broadly termed rights, the Istanbul Convention contains specific provision on FGM. Article 38 stipulates that "parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: (a) excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; (b) coercing or procuring a woman to undergo any of the acts listed in point a; (c) inciting, coercing or procuring a girl to undergo any of the acts listed in point a".[278]

[276] EIGE, 'Mutilations génitales féminines entre les hommes et les femmes Combien de filles courent-elles un risque en France?' (9 November 2018) https://eige.europa.eu/publications/female-genital-mutilation-how-many-girls-are-risk-france accessed 10 March 2020.
[277] Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) (2014) CETS No 210, art 5.
[278] Ibid art 38.

3.11 Laws Relevant to FGM in France

In contrast with the UK, France is a monist state, meaning that France's international treaty obligations are an integral part of the French legal framework. Nevertheless, the domestic provisions which enable these commitments to be delivered are of critical importance. FGM is illegal in France, but it is not criminalised under a specific statute. It is however proscribed by the general provisions within the *Code Pénal* (Penal Code) relating to violence causing mutilation. FGM of an adult is punishable by a 10-year prison sentence and a 150,000 euro fine[279]; if the act is performed on a minor (below 15 years) it is punishable by 15 years' imprisonment.[280] In the event that the act is performed abroad on a minor usually resident on French territory, the principle of extraterritoriality applies and French law is applicable.[281] The parents of the victim can also be prosecuted as *complices* (accomplices) under provisions of the *Code Pénal*.[282]

Within the European Union, France is the country with the largest number of FGM prosecutions, with over 35 cases tried.[283] It is a huge accomplishment particularly when compared to England's four cases and it is striking that the jurisdiction without targeted laws has apparently performed more strongly in this regard. Remarking on the use of criminal law

[279] *Code Pénal*, art 222-9.
[280] *Code Pénal*, art 222-10.
[281] *Code Pénal*, art 222-16-2 and 113-7.
[282] *Code Pénal,* art 113-5.
[283] Els Leye et al, 'An analysis of the implementation of laws with regard to female genital mutilation in Europe' (2007) 47 Crime Law Social Change, 16.

mechanisms, Gaffney-Rhys avers that the use of generic legislative provisions is advantageous since it does not stigmatise immigrant or minority communities.[284]

General provisions on child protection laws in France can also be applied in cases of FGM. In 2007, the Protection of Children in Danger law was passed.[285] The law provides for two types of protection: "administrative protection under the Departmental Council and governed by the Social Work and Family Code, and legal protection under the children's courts, governed by the Civil Code".[286] Article 375 of the *Code Civil (*Civil Code) lists protection measures for children below 18 years, where their health or security is endangered. In such cases the juvenile judge can order that the child is temporarily placed with: (1) the other parent, (2) another member of the family or a trustworthy third party, (3) a departmental child welfare service, (4) a service or establishment authorized to receive minors on a day-to-day basis or according to any other method of care, or (5) a health or education service or establishment, ordinary or specialised.[287] The court may also prohibit the child from being taken out of the country, and that this ban is entered into the file of persons wanted by the public prosecutor.[288]

There is an obligation on public officers/employees who become aware of a crime or offence in the course of their duties to report to the *Procureur* (Public Prosecutor).[289] Frontline

[284] Ruth Gaffney-Rhys, 'From the Offences Against the Person Act 1861 to the Serious Crime Act 2015 - the development of the law relating to female genital mutilation in England and Wales' (2017) 39 J Soc Welf Fam Law 421.
[285] EIGE, '*Mutilations génitales féminines entre les hommes et les femmes Combien de filles courent-elles un risque en France?*' (9 November 2018) https://eige.europa.eu/publications/female-genital-mutilation-how-many-girls-are-risk-france accessed 10 March 2020.
[286] Ibid.
[287] *Code Civil*, art 375-3.
[288] *Code Civil*, art 375-7.
[289] *Code de procédure pénale*, art 40; *Code Pénal*, art 434-2 and 223-6.

professionals are exempt from the strict obligations of professional confidentiality for the purposes of flagging suspected cases of FGM, provided that disclosures are made in good faith.[290] Consequently, these public servants have both the right and duty to report relevant concerns.[291]

3.12 France's Policy Framework on FGM

France has developed a public policy framework dealing with the prevention of violence against women, and FGM comes under this remit. The first Inter-Ministerial plan (2005-2007) broadly dealt with violence against women without specifically naming FGM, however, subsequent iterations post-2008 have mentioned FGM and set out specific actions against the practice.[292] In this regard, the Inter-Ministerial Mission for the Protection of Women against Violence and the Fight against Human Trafficking (MIPROF) was created in 2013 – MIPROF includes FGM in its mandate.[293] In 2016, MIPROF published a training kit on FGM called "Bilakoro" which is a guide for health professionals and "focuses on identifying and caring for women and young girls confronted with female genital mutilation".[294]

The fifth Inter-Ministerial plan (2017-2019) sought to increase support mechanisms for victims of FGM, pursue preventive actions against FGM among relevant professionals, update

[290] *Code Pénal* art 226-14.
[291] *Code Pénal*, art 226-14.
[292] EIGE, '*Mutilations génitales féminines entre les hommes et les femmes Combien de filles courent-elles un risque en France*?' (9 November 2018) https://eige.europa.eu/publications/female-genital-mutilation-how-many-girls-are-risk-france accessed 10 March 2020.
[293] Ibid.
[294] GOUV.FR, '*Outils de formation sur les mutilations sexuelles féminines'* https://arretonslesviolences.gouv.fr/je-suis-professionnel/outils-mutilations-sexuelles-feminines accessed 10 March 2020.

knowledge and information on FGM as well as have a follow-up mechanism of the progression of its prevalence, establish local prevention and awareness-raising initiatives.[295]

The education sector has developed guides on addressing FGM, such as *Le praticien face aux mutilations sexuelles féminines* (The practitioner faced with female sexual mutilation) and *Comportements sexistes et violences sexuelles* (Sexist behaviour and sexual violence); these are resources for educational teams in junior and senior high schools.[296] *Protection Maternelle Infantile* (PMI) (maternal and child protection centres) have implemented local protocols on FGM; the Seine-Saint-Denis region PMI implemented "*Comment se comporter face aux mutilations génitales féminines*" (how to behave when faced with FGM),[297] while the Paris PMI implemented the *Conduite à tenir face à l'excision des petites filles* (how to deal with the excision of little girls).[298] PMIs play an important role in preventing FGM and identifying victims which enables perpetrators to be prosecuted as will be discussed further below.

3.13 Conclusion

This chapter has assessed the legal dimension to the Medium of both England and France, beginning at the international level and zooming the focus in from there. One of the key

[295] EIGE, '*Mutilations génitales féminines entre les hommes et les femmes Combien de filles courent-elles un risque en France*?' (9 November 2018) https://eige.europa.eu/publications/female-genital-mutilation-how-many-girls-are-risk-france accessed 10 March 2020.
[296] EIGE, '*Mutilations génitales féminines entre les hommes et les femmes Combien de filles courent-elles un risque en France*?' (9 November 2018) https://eige.europa.eu/publications/female-genital-mutilation-how-many-girls-are-risk-france accessed 10 March 2020.
[297] Ibid.
[298] Els Leye and Alexia Sabbe, 'Overview of Legislation in the European Union to address Female Genital Mutilation: Challenges and Recommendations for the Implementation of Laws' (United Nations 2009) 5.

takeaways in comparing France and England's legal frameworks is the fact that France does not have a specific law banning FGM while England does. In subsequent chapters, we shall consider how the differential legal treatment relates to other aspects of the Medium in both settings, and shed light on the core question of this investigation: why France has forged so far ahead in bringing forward prosecutions for FGM and using criminal law to defend the interests which this practice violates.

CHAPTER FOUR – MULTICULTURALISM AND THE MEDIUM

4.1 Introduction

In seeking to understand the nature of divergent systemic responses to FGM as a minority cultural practice, the prevailing climate of the Medium in respect of multiculturalism is a key consideration. It is not suggested that the approach to multiculturalism is the only important element of the Mediums in England and France explaining the contrasts between the settings. For example, attitudes towards bodies, family relationships and expressions of human sexuality are among the plethora of other factors at play. However, it is not realistic to attempt a comprehensive comparison of the social and cultural variations between the two nations within the confines of this thesis. Given the fundamental importance of policies in respect of multiculturalism when it comes to managing diversity and balancing competing minority rights, I have chosen to foreground this feature of the Medium. This chapter examines multiculturalism as a concept, and the interplay between varying incarnations of this idea and societal treatment of FGM, particularly in legal and political terms.

Multiculturalism is a live issue for both England and France, because in common with the great majority of countries in the world, they are culturally diverse nations, partly as a result of migration. Many of the immigrants come from former French and English colonies. In England and Wales, 9.5 million (or 18% of the population) accounts for Black and Minority Ethnic (BME)

people, based on data from the 2021 Census.[299] According to the census, the largest group of BME in England and Wales are Asian or British Asian people at 5.4 million, followed by Black, Black British, Caribbean or African at 2.4 million.[300] In France, the 1979 *Loi Informatique et Libertés* (Law for Data Protection) restricts the collection of data that distinguishes between its citizens – demographics on ethnicity, nationality and religion are thus prohibited.[301] Guimond et al estimate that in 2006, immigrants made up 8% of the population with the largest immigrant group being people from the former colonies of the Maghreb, particularly Algeria, Morocco, and Tunisia, representing 1.55 million people.[302]

Based on these statistics, it is unsurprising that cultural practices such as FGM, which are foreign to the majority culture, are now found within France and England and that the legislative frameworks need to address this reality. The preceding chapter revealed differences in legislation and policies between the two nations vis-à-vis FGM. It has already been suggested that these divergent enforcement practices and their outcomes has to do with underlying national views on citizenship, which in turn influence responses to cultural diversity and consequently have an impact upon these nations' response to foreign practices such as FGM.[303] Whilst their response to multiculturalism is vastly different, multiculturalism

[299] Office of National Statistics, 'Ethnic group, England and Wales: Census 2021' (29 November 2022) https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/bulletins/ethnicgroupenglandandwales/census2021#:~:text=the%20%22Asian%2C%20or%20Asian%20British,was%2081.0%25%20(45.8%20million) accessed 2 December 2022.

[300] Ibid.

[301] World Population Review, 'France Demographics' https://worldpopulationreview.com/countries/france-population accessed 1 December 2020.

[302] Rodolphe Kamiejski, Pierre De Oliveira and Serge Guimond, 'Ethnic and Religious Conflicts in France' in Dan Landis and Rosita D Albert (eds) *Handbook of Ethnic Conflict: International Perspectives* (Springer 2012) 484. See also, Lhommeau, B et Simon P, 'Les populations enquêtées' dans C Beauchemin, C Hamel et P Simon (eds) *Trajectoires et Origines. Enquête sur la diversité des populations en France* (Premiers résultats, INED 2020) 11–18.

[303] See for example, Renée Kool and Sohail Wahedi, 'European Models of Citizenship and the Fight against Female Genital Mutilation' in Scott N Romaniuk and Marguerite Marlin (eds) *Development and the Politics of Human Rights* (1st edn, Routledge 2015); Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution,

as an ideology bears closer scrutiny since both nations have had to engage with it on some level, and it is this task upon which we are about to embark.

4.2 Multiculturalism: A brief overview

Defining multiculturalism as a concept is by no means a straightforward task. Even prolific defenders of multiculturalism such as Kymlicka, admit that the term's diverse understandings and applications risk causing misunderstanding and confusion.[304] According to Inglis, there are three referents to multiculturalism which are often interrelated, but are nonetheless distinctive in public debate and discussion.[305] They are: the "demographic-descriptive," "programmatic-political" and "ideological-normative," and she defines them as follows: -

1. The demographic-descriptive usage occurs where 'multicultural' is used to refer to the existence of ethnically or racially diverse segments in the population of a society or State.
2. The programmatic-political usage refers to specific types of programs and policy initiatives designed to respond to and manage ethnic diversity.
3. The ideological-normative usage generates the greatest level of debate since it constitutes a slogan and model for political action based on sociological theorising and

Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 477-519.

[304] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press 2007) 17.

[305] Christine Inglis, '*Multiculturalisme: Nouvelles Reponses de Politiques Publiques a la Diversite'* (UNESCDOC Digital Library 16) https://unesdoc.unesco.org/ark:/48223/pf0000105582_fre?posInSet=1&queryId=586e3a3c-d7f8-484c-b7d6-a5d9c5e3f3b9 accessed 1 December 2020. See also Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) European Multiculturalism Revisited (Zed Books 2010) 12-14.

ethical-philosophical consideration about the place of those with culturally distinct identities in contemporary society.[306]

Historically, multiculturalism first emerged in Western democracies in the late 1960s. It arose as a political movement challenging pre-existing racial and ethnic legacies hierarchies, drawing upon "the human rights revolution and its foundational ideology of the equality of races and peoples".[307] Multiculturalism has been defined as "a branch of political philosophy that explores the relationship between cultural diversity and human freedom and well-being, while offering justifications for accommodating the claims of cultural minorities in legal and political institutions and public policies".[308] The foundations for the modern and diverse concepts of multiculturalism essentially began as "a debate between liberals and communitarians over the community's role in facilitating individual freedom and well-being".[309] These were by writers such as Kymlicka[310], Raz[311] and Taylor[312]. There was then a shift in focus onto "the relationship between majority and minority cultural communities and the justifiability of minority rights".[313]

[306] Christine Inglis, '*Multiculturalisme: Nouvelles Reponses de Politiques Publiques a la Diversite'* (UNESCDOC Digital Library 16) https://unesdoc.unesco.org/ark:/48223/pf0000105582_fre?posInSet=1&queryId=586e3a3c-d7f8-484c-b7d6-a5d9c5e3f3b9 accessed 1 December 2020.

[307] Will Kymlicka, 'The rise and fall of multiculturalism? New debates on inclusion and accommodation in diverse societies' (2010) 61(199) International social science journal 100.

[308] Michael Murphy, 'Multiculturalism' (Oxford Bibliographies, 22 February 2018) https://www.oxfordbibliographies.com/view/document/obo-9780195396577/obo-9780195396577-0361.xml accessed 22 June 2021.

[309] Ibid.

[310] Will Kymlicka, *Liberalism, Community, and Culture* (Oxford University Press 1989).

[311] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).

[312] Charles Taylor, 'Atomism' (1985) 2 Philosophical Papers; Charles Taylor, *Philosophy and the Human Sciences* (Cambridge University Press 1985) 187–210.

[313] Michael Murphy, 'Multiculturalism' (Oxford Bibliographies, 22 February 2018) https://www.oxfordbibliographies.com/view/document/obo-9780195396577/obo-9780195396577-0361.xml accessed 29 June 2021.

There is an expansive body of writing on multicultural theory produced by a broad range of political philosophers who represent the diverse perspectives and approaches in the field. According to Murphy, there are seven main arguments in favour of, or rather, in defence of multiculturalism. They are: liberal culturalism, tolerationist multiculturalism, the value of cultural diversity, the politics of inclusion, deliberative multiculturalism, democratic multinationalism, and the politics of recognition.[314] It is beyond the scope of this thesis to individually discuss each of these arguments, however, many of them will form part of the discussion where applicable.

Among multiculturalists, the question of which social groups belong to the 'multicultural bracket' or the term 'cultural minority' is a contentious one. Phillips[315], Miller[316] and Young[317] use the term narrowly to include mainly ethnocultural groups such as cross-border immigrants, while Kymlicka, Kukathas and Murphy[318] use the term more liberally to include indigenous people and national minorities. For the purposes of this thesis, the primary focus of multiculturalism as relates to its three referents (described above) is on immigrants, since FGM in France and England is typically practiced by immigrants originating from practicing countries.

Multiculturalism as a political philosophy has encountered opposition. Murphy encapsulates the criticism as follows: -

[314] Michael Murphy, *Multiculturalism A Critical Introduction* (Routledge 2012) 62.
[315] Anne Phillips, *Multiculturalism Without Culture* (Princeton University Press 2009).
[316] David Miller, *On Nationality* (Clarendon Press 1995).
[317] Iris M Young, *Justice and the Politics of* Difference (Princeton University Press 1990).
[318] Michael Murphy, *Multiculturalism A Critical Introduction* (Routledge 2012).

> Multiculturalism is frequently associated with a retreat from enlightenment principles of reason and universality, and with a commitment to preserving cultural diversity at the expense of liberalism's most fundamental commitments to individual rights and the moral equality of all human beings. Multiculturalists are accused of being far too willing to tolerate intolerant cultural minorities and far too reluctant to sanction intervention when minorities take advantage of this forbearance to undermine the freedom and dignity of their own members.[319]

In recent years, the political climate has become more antagonistic than accommodating towards multiculturalism. Much of the hostility derives from immigrant-driven diversity, with Muslim immigrants bearing the brunt as a result of Islamophobia, caused by the increased global threat to security from Islamic extremism. This has been more apparent in Europe, where Muslims frequently comprise a significant proportion of the total immigrant population.[320]

> Fear of Muslims may be the most visible form of multicultural anxiety in Europe today, but it is in fact part of a more general trend towards antiimmigrant sentiment that is manifesting itself in different degrees and forms in countries like Switzerland, Italy, Denmark, Belgium, France, Germany, the Netherlands, the United Kingdom and Spain.[321]

[319] Michael Murphy, *Multiculturalism A Critical Introduction* (Routledge 2012) 12.
[320] Ibid 1.
[321] Michael Murphy, *Multiculturalism A Critical Introduction* (Routledge 2012) 2.

According to Ratuva, the major causes of immigrant-driven ethnic conflict can be structurally linked to factors such as "economic inequality, competition over resources, or contestation over political power"; ethnicity also intersects in complex ways with other social factors such as class, gender, human rights abuses, marginalisation, discrimination, and political ideology.[322] He argues that ethnic differences may not singularly trigger conflict but the intersectionality with the aforementioned factors may create a volatile situation.[323]

4.3 Policy Models Addressing Multiculturalism

The following policy models are typically used to address multiculturalism. Inglis describes them as "abstract, ideal types based on specific ideological-normative statements concerning the relationship between ethnic groups in a society".[324] I will define all three, however, the two that are relevant to the case of France and England, are the assimilationist model and multiculturalism model, respectively.

The "differentialist model" avoids conflict through processes which eliminate or minimise contact with ethnic minorities, thus the state is not required to accommodate minorities.[325] An extreme version of this model involves the expulsion or 'ethnic cleansing' of ethnic

[322] Steven Ratuva, *The Palgrave Handbook of Ethnicity* (Springer Singapore 2019) 20.
[323] Ibid 2.
[324] Christine Inglis, '*Multiculturalisme: Nouvelles Reponses de Politiques Publiques a la Diversite'* (UNESCDOC Digital Library, 42) https://unesdoc.unesco.org/ark:/48223/pf0000105582_fre?posInSet=1&queryId=586e3a3c-d7f8-484c-b7d6-a5d9c5e3f3b9 accessed 1 December 2020.
[325] Ibid 37.

minorities, but the most common forms are policies which "substantially restrict the participation of ethnic minority members in the mainstream society".[326]

The "assimilationist model" requires cultural minorities to be incorporated fully into the society through "a process of individual change", whereby they "abandon their distinctive linguistic, cultural and social characteristics" and adopt those of the dominant culture.[327] Since change is viewed as the individual's responsibility, the state is not required to alter its institutions to accommodate the specific needs of minorities.[328] As Inglis notes, France is an obvious example of a contemporary nation which addresses ethnic and cultural diversity with an assimilationist model.[329] Citizenship in France[330] is viewed as a contract between the individual and the state without the mediation of other entities (culture and religion) and is based on the strict separation of the private from the public space.

The "multiculturalism model", on the other hand, recognises diversity and perceives it as desirable. The 'Other' is seen as a positive addition to society and not as a threat to the identity, values and culture of the host society.[331] Ideally, ethnic and cultural minorities are incorporated into society without losing their distinctiveness and state institutions may

[326] Christine Inglis, '*Multiculturalisme: Nouvelles Reponses de Politiques Publiques a la Diversite'* (UNESCDOC Digital Library, 37) https://unesdoc.unesco.org/ark:/48223/pf0000105582_fre?posInSet=1&queryId=586e3a3c-d7f8-484c-b7d6-a5d9c5e3f3b9 accessed 1 December 2020.
[327] Ibid.
[328] Ibid.
[329] Ibid 39.
[330] Irene Bloemraad, 'Unity in Diversity? Bridging Models of Multiculturalism and Immigrant Integration' (2007) 4(2) Du Bois Review 319.
[331] Alessandro Silj, 'Introduction' in Alessandro Silj (ed) *European Multiculturalism Revisited* (1st edn, Zed Books 2013) 12.

require modification in order to accommodate the specific needs of minorities and thus provide equally for them.[332]

Whilst France falls quite neatly within the assimilationist model, England is said to be "more complicated to decide" but that to a "certain degree" applies the multiculturalism model.[333] Kool and Wahedi explain that due to a growing globalisation and a global fear of Muslim terrorism, English views on citizenship have emerged that merge more seamlessly with an "ethnocultural model" whose focus is creating a "culturally homogeneous society", which leaves little room for cultural diversity.[334] Kalev notes that Britain has generally adopted this modified approach to multiculturalism, particularly with regard to legislation.[335] She avers that although "toleration and absorption" is generally desired in the society, the "'bottom line' is that Great Britain is a British country and so is entitled to determine its own British cultural and moral norms in legislation".[336]

In their paper, 'Comparing British and French approaches to tackling forced marriage,' Engeland and Gill assert that England attempts to accommodate difference through a policy of "inclusive multiculturalism" whereas France practices a "restrictive multiculturalism".[337] They note for example that the legal and governmental framework in Britain allows religious

[332] Christine Inglis, '*Multiculturalisme: Nouvelles Reponses de Politiques Publiques a la Diversite'* (UNESCDOC Digital Library 38) https://unesdoc.unesco.org/ark:/48223/pf0000105582_fre?posInSet=1&queryId=586e3a3c-d7f8-484c-b7d6-a5d9c5e3f3b9 accessed 1 December 2020.
[333] Renée Kool and Sohail Wahedi, 'European Models of Citizenship and the Fight against Female Genital Mutilation' in Scott Nicholas Romaniuk and Marguerite Marlin (eds) *Development and the Politics of Human Rights* (1st edn, Routledge 2015) 210.
[334] Ibid.
[335] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 344.
[336] Ibid.
[337] Aisha K Gill and Anicée Van Engeland, 'Criminalization or 'multiculturalism without culture'? Comparing British and French approaches to tackling forced marriage' (2014) 36(3) Journal of Social Welfare & Family Law 242.

tribunals to exist. France, however, "prevents any form of cultural or religious doctrine from penetrating the legal realm" in a bid "to protect the secular Republic's core values", which it sees as inherently threatened by the manifestation of cultural and religious practices in the public domain.[338]

According to Inglis, national myths concerning a nation's origins, characteristics and national identity intersect with the aforementioned models, and together they "define the abstract notions of which constitute the nation's citizenry".[339] She observes that, for example, "a state may view itself as a 'nation of immigrants' or the guardian of important revolutionary principles".[340] These notions of citizenship naturally influence the nation's response to multiculturalism and thereby cultural practices such as FGM.

4.4 Multiculturalism and the Human Rights of Women

> What should a liberal democratic government do when the traditions and practices of a cultural minority within the society violate the rights of female members of that minority, in particular, such rights as would warrant protection by the government of the larger liberal society?[341]

Cultural practices such as FGM pose a threat to the human rights ethos, that are particularly embedded within the liberal traditions of the west. With an increasingly multicultural world,

[338] Ibid.
[339] Christine Inglis, 'Multiculturalisme: Nouvelles Reponses de Politiques Publiques a la Diversite' (UNESCDOC Digital Library, 45) https://unesdoc.unesco.org/ark:/48223/pf0000105582_fre?posInSet=1&queryId=586e3a3c-d7f8-484c-b7d6-a5d9c5e3f3b9 accessed 1 December 2020.
[340] Ibid 43.
[341] Marilyn Friedman, *Autonomy, Gender and Politics* (Oxford University Press 2003) 179.

balancing the right to autonomy of minorities against the liberal values of the majority becomes a challenge. The central issue becomes, to what extent the right to autonomy should be granted. Grillo poses the question: "What kind of pluralism is possible or desirable in countries like Britain, France and the USA, where there is commitment to universalistic, democratic ideals? What room should such societies allow for being French or British or American 'differently'?".[342]

Defendants of FGM often base their arguments on the concept of group rights for minorities and on cultural relativism. The latter argument which is supported by 'feminism of colour or feminism of difference' proposes that cultural relativism rather than universalism, should be the primary basis for establishing moral norms and legislation.[343] Whilst these two positions justifying FGM are related, the principles upon which they are based differs. I shall begin with the defence of group rights and conclude with the claim for cultural relativism.

4.5 Group Rights and FGM

Defenders of group rights and the preservation of cultural practices such as FGM, often base their claims on liberal ideals that extend from the differing views of liberal multiculturalists such as Kymlicka, Kukathas and Halbertal and Margalit. Kymlicka who is a key defender of cultural group rights, states that membership in a "rich and secure cultural structure," is necessary for a person to develop a strong identity, self-respect, and personal autonomy.[344]

[342] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Clarendon Press 1998) 189.
[343] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 340.
[344] Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press 1991) 165.

The 'rights of the individual' are at the heart of his justification of group rights – the individual's right to autonomy must not be curtailed by the collective rights of the group. Accordingly, Kymlicka denies group rights to cultures that restrict the "basic civil or political liberties" of their members, stating that to support them "undermines the very reason we had for being concerned with cultural membership— that it allows for meaningful individual choice".[345]

Okin criticizes liberal multiculturalists such as Kymlicka, as failing to address intragroup inequalities, specifically gender inequality, when examining the legitimacy of minority group rights.[346] In defending his position against this critique, Kymlicka concedes that a liberal theory of minority group rights cannot accept what he refers to as "internal restrictions" which "aim is to restrict the ability of individuals within the group (particularly women) to question, revise, or abandon traditional cultural roles and practices".[347] Although Kymlicka's position does allow (in rare circumstances) for temporary illiberal measures in order to safeguard a cultural group from becoming extinct, his main position is that only internally liberal cultural groups should be given special group rights.[348] Nevertheless, Okin claims that few minority cultures will be able to claim group rights under Kymlicka's justification due to the less overt nature of sex discrimination within the private sphere. She argues that although in many cultures women's basic civil rights and liberties are formally assured, it is unfortunately the norm that these rights and liberties are violated within the domestic sphere, through various forms of violence and gender discrimination.[349]

[345] Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press 1991) 171-72.
[346] Susan M Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 12.
[347] Will Kymlicka, 'Liberal Complacencies' in Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 31; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1996) ch 3.
[348] Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press 1991) 170.
[349] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 679.

This is precisely Okin's criticism of Kymlicka; that his account of 'internal restrictions' is too narrow and formal, acknowledging overt sex discrimination when such discrimination is mostly informal and private. In this regard, Kymlicka's assertion on the importance of culture to one's own self-respect becomes untenable. As Okin observes, "one's place within one's culture is likely to be at least as important as the viability of one's culture in influencing the development of one's self-respect and capacities to make choices about life".[350] With regard to FGM, Kymlicka's denial of group rights for internally illiberal cultural groups means his views cannot justify the practice. However, his failure to specifically address gender inequality, especially its more hidden and subtle aspects, arguably renders his theory inapplicable to most cultural groups.[351] As Okin observes, virtually no culture (minority and majority) in the world today can pass his 'no sex discrimination test' if applied in the private sphere.[352]

In 'Liberalism and the Right to Culture', Halbertal and Margalit assert in their opening lines that, "human beings have the right to culture—not just to any culture, but their own".[353] The right to culture is protected in a number of international human rights instruments such as Article 27 of the UDHR, article 27 of the ICCPR and Article 15 of the ICESCR. While referencing ultra-Orthodox Jews in Israel, Halbertal and Margalit claim that "protecting cultures out of the human right to culture may take the form of an obligation to support cultures that flout the rights of the individual in a liberal society".[354] This is because culture plays a crucial role in shaping the personalities of individuals, what they refer to as "personality identity". According

[350] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 683.
[351] Susan M Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 21.
[352] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 679.
[353] Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture' (1994) 71(3) Social Research 529.
[354] Ibid.

to them, personality identity derives from a particular "way of life and the traits that are central identity components for [an individual] and the other members of his cultural group".[355] Whilst they do not make it explicit whether all persons have personality identities, or only those who have grown up in ultra-Orthodox Jewish minority groups or similar, Okin argues that a justification of special rights for a religious minority must show that the alternative (a personality identity realised in a non-ultra-Orthodox Jewish community/liberal community) is inferior or harmful to them.[356] She contends that as opposed to a liberal culture, an ultra-Orthodox culture is likely more harmful to "the individual interests of its male and female children", therefore it is unacceptable and cannot be sustained both from liberal and specifically feminist standpoints.[357]

According to Halbertal and Margalit, in an ultra-Orthodox Jewish culture the central facet of the personality identity of men is the attribute of being a Torah scholar.[358] The role of women in the community is to facilitate the men's religious duty, a role which Okin argues makes their personality identities "less central to the culture", thus raising an immediate counterclaim as to the women's own "sense of equal worth or self-respect".[359] Further, such determinations of personal identity are based solely on sex and do not consider the personal wishes and inclinations of the boys and girls.[360] It may be that the boy lacks the desire for religious study/vocation while a girl has such a desire. From a liberal and feminist standpoint, such a position is illiberal and thus problematic.

[355] Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture' (1994) 71(3) Social Research 542.
[356] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 672.
[357] Ibid.
[358] Avishai Margalit and Moshe Halbertal, 'Liberalism and the Right to Culture,' (1994) 71(3) Social Research 539.
[359] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 673.
[360] Ibid.

A core concern of liberal multiculturalism is the preservation of the individual rights of the members of a cultural group, while feminism is concerned with the equal treatment of men and women. It is therefore questionable whether a liberal multiculturalist can justify giving special group rights to an illiberal cultural group on both fronts. In the case of FGM, one might ask whether the 'personality identity' of girls and women in practicing communities justifies the practice. It is true that in certain communities such as the Ameru[361] in Kenya, the circumcision of girls is seen as rite of passage and a mark of respect – of course this view has now largely evolved and FGM is illegal in Kenya. Nonetheless, according to Halbertal and Margalit's view, in such a community female circumcision is central to the personality identity of women, thus it ought to be preserved. Their view, however, fails to account for the fact that this supposed personal identity is effectively a forced one, since the right to choose to undergo the circumcision is not available to young girls in the first place – it is expected and required of them. In this regard, Halbertal and Margalit's justification will also fail from a liberal and feminist standpoint as being illiberal.

In his article 'Are There Any Cultural Rights?', Kukathas argues that cultural communities should be seen as "associations of individuals whose freedom to live according to communal practices each finds acceptable is of fundamental importance".[362] Unlike Kymlicka, Kukathas does not oppose internally illiberal groups because according to him, the individual has a choice whether or not to live by the terms of his community and the evidence of this is "the

[361] Gerald Mutethia, 'FGM rife in Meru despite ban' *The Star* (Nairobi, 10 April 2019) https://www.the-star.co.ke/counties/eastern/2019-04-10-fgm-rife-in-meru-despite-ban/ accessed 19 December 2020.
[362] Chandran Kukathas, 'Are There Any Cultural Rights?' (1992) 20(1) Political Theory 116.

fact that members choose not to leave".[363] He therefore argues that if the members of a community wish to continue to live by their beliefs, the outside community has no right to interfere or prevent them from doing so.[364] In another article, he avers that, "Perhaps toleration of cultural practices of ethnic groups includes allowing ritual acts to be carried out upon children, because these can be an essential part of the culture, and allows parents to educate and raise their children according to their cultural laws".[365] In this regard, Kukathas' model appears to support FGM and can be employed to defend its continuation.

Unlike Kymlicka, Kukathas argues that there is no need to reinterpret liberalism and questions the idea for collective group rights; he maintains instead, that the fundamental importance of individual liberty or individual rights be reasserted.[366] One might thus argue that Kukathas's tolerationist theory simultaneously supports and contradicts FGM because of the requirement for personal autonomy. As Kalev points out, the individual's right to leave in this case, would only be available to adult women in danger of FGM who have the capability to leave the community, this is assuming that the women in question can overcome "the economic and social obstacles" that may impede them from exercising their right to leave.[367] It provides no solution to infants and young girls at risk of FGM, who are yet to develop autonomy and are incapable of leaving the group, nor to adult women who are in practical terms trapped by their circumstances.

[363] Chandran Kukathas, 'Are There Any Cultural Rights?' (1992) 20(1) Political Theory 116.
[364] Ibid.
[365] Chandran Kukathas, 'Liberalism and its critics' (1986) Humane Studies Review 1–110, as cited in Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 342.
[366] Chandran Kukathas, 'Are There Any Cultural Rights?' (1992) 20(1) Political Theory 107.
[367] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 342.

Another complication that concerns children is their education. According to Kukathas, since membership to a cultural group is voluntary, there is no requirement for assimilation or the requirement for "particular standards or systems of education within such cultural groups or to force their schools to promote the dominant culture".[368] This contradicts Kukathas's central message on the 'freedom to choose.' Children cannot be expected to grow into bona fide voluntary members of a cultural group without receiving an education that exposes them to different world views. Okin argues this very point against Halbertal and Margalit's justification of group rights for ultra-Orthodox Jews in Israel. In the ultra-Orthodox Jewish community, the education of boys is largely devoted to and geared towards religious study, that is, mastering the Torah, and Okin questions how a liberal multiculturalist can justify the public support of such an educational system where boys have no right to choose their areas of interest or exit the group.[369]

Kukathas' stance is also problematic since his only requirement of "voluntary participation in cultural practices is a difficult and complex variable to measure".[370] Would it be possible to assess voluntary participation in practices such as FGM, since minority groups are often closed communities? Indeed, Kalev asks, "Who would know what processes of persuasion, indoctrination, implicit or explicit threats are carried out within the community?".[371] It may also be that those who voluntarily remain members of illiberal cultural groups stay for reasons such as cultural affinity or family connection even while objecting to certain practices.[372] In

[368] Chandran Kukathas, 'Are There Any Cultural Rights?' (1992) 20(1) Political Theory 118.
[369] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 672-3.
[370] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 342.
[371] Ibid.
[372] Ibid.

such circumstances, the state would not be able to adequately protect such individuals as they are presumed to be willing participants by virtue of their voluntary membership.[373]

Kukathas's tolerationist theory therefore cannot provide reasonable justification for the practice of FGM. His defence of illiberal practices within minority groups based on a central message of freedom of choice does not hold water, because he fails to address the "hidden and more subtle problems of coercion and education".[374] It is more likely that his theory would be employed not as a justification of culture, but as a means for illiberal cultural groups not to be interfered with by the state.[375]

In concluding this section, it is important to note here that the concepts put forth by the various scholars are theoretical political philosophies, and thus, may not necessarily be applicable in real life, especially where human rights protections exist. And as demonstrated, a critical attempt to justify FGM using these theories cannot be sustained.

4.6 Cultural Relativism vs Universal Human Rights

Is it appropriate for the United Nations' human rights system to criticize longstanding cultural practices that conflict with its established human rights norms?[376]

[373] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 342.
[374] Ibid 343.
[375] Ibid.
[376] Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study' (1989) 7(3) Law & Inequality: A Journal of Theory and Practice 367.

This question frames the conflict between cultural relativism and human rights theory. Cultural relativism has been defined as "the position that there is no universal standard to measure cultures by, and that all cultures are equally valid and must be understood in their own terms".[377] Kalev avers that the claims of feminists of colour and cultural relativists are comparable since they are both based on "anthropological (empirical) premises rather than philosophical (conceptual) premises".[378] This is to say that cultural practices and/or beliefs are assessed through the lens of observed human behaviour and norms, rather than abstract ideas of human behaviour and norms in general. Cultural relativists and feminists of colour claim that every culture has its own distinct moral system upon which its moral norms are built.[379] Human rights theorists, on the other hand, argue that philosophically, there are certain basic norms derived from essential features of human nature, that are common to all cultures and transcend cultural differences.[380]

This question of relativity of values is the proverbial thorn in the side for 'universal' human rights. As Kalev notes, "if there is no universal human nature, in the sense that people's conception of man differs essentially between cultures, then it seems that constructing a universal system of values applicable to 'man' in general is merely a philosophical pipe dream".[381] This suggests that a perpetual incongruity exists between both sides. For instance, the granting of universal women's rights at the United Nations Fourth World Conference on

[377] Oxford reference, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095652905 accessed 21 December 2020.
[378] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 346.
[379] L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 227.
[380] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 346.
[381] Ibid.

Women in 1995 was a pivotal moment in history, but it had been opposed by "Islamic and Christian fundamentalists including the representatives of some Asian governments and leading members of the Catholic church on both cultural and doctrinal grounds".[382] These factions opposed the validity of *universal* human rights for women, alleging that they "bear a Western imprint"[383] thus challenging the concept of human rights "as a Western ploy, a form of cultural imperialism and intellectual colonialism".[384]

In examining cultural relativism in France, Winter argues that the cultural relativists' criticism of republican universalism and their insistence on the "respect for cultural difference", is paradoxical since they do so on the "basis of the republican and universalist notions of "private choice" and the "rights of Man".[385] She explains that although they strongly oppose any notion of universal rights, they base their defense of cultural difference "on the assumption -explicit or implicit- that each culture has an intrinsic 'right' to exist and to express itself and that members of other cultures do not have a 'right' to criticize the form this 'expression' may take".[386] This, according to Winter, appears to be "a cross-cultural extrapolation of the classic liberal discourse on the inviolability of the individual's right to 'his' inner sanctum that escapes public scrutiny".[387]

[382] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 345.
[383] L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 277.
[384] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 345.
[385] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19 Feminism and the Law 959.
[386] Ibid.
[387] Ibid.

The conflict between cultural relativism and universal human rights is also apparent with regard to adopting international human rights instruments. FGM is regarded as a human rights violation and is addressed primarily under CEDAW which requires member states to take measures to abolish cultural practices that discriminate against women. The tension between universal human rights and cultural relativism is displayed by the reservations to article 2 of CEDAW, entered by certain states where FGM is prevalent. Justification for reservations are made on the ground that national law, tradition, religion or culture are not congruent with Convention principles.[388]

The reservation entered by Iraq which has an FGM prevalence of 42.8%[389] holds: "Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, subparagraphs (f) and (g)".[390] The subparagraphs provide: "(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women".[391] Egypt which has an FGM prevalence of 87.2%[392] states in its general reservation to article 2: "The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance

[388] UN Women, 'CEDAW Reservations' https://www.un.org/womenwatch/daw/cedaw/reservations.htm accessed 22 December 2020.
[389] 28 Too Many, 'Iraqi Kurdistan' https://www.28toomany.org/country/iraqi-kurdistan/ accessed 22 December 2020.
[390] UN 'Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women' (10 April 2006) CEDAW/SP/2006/2 14.
[391] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 34 UNTS 180 (CEDAW) art 2 (f) (g).
[392] 28 Too Many, 'Egypt' https://www.28toomany.org/country/egypt/ accessed 22 December 2020.

does not run counter to the Islamic sharia".[393] Such reservations prove that, empirically, there is no 'universal' moral standard which indeed is the claim made by cultural relativists.

4.7 Feminism of Colour and Essentialising Culture

The same impasse exists between western feminists and feminists of colour. It is important to acknowledge that there are some who may identify as both, that being said, the distinction is made here to elaborate on the philosophical differences that exist between both factions on the issue of universal human rights for women.

In the 1980s, feminism of colour gathered momentum as it became apparent to women of colour that "traditional feminism was ethnocentric".[394] Okin concedes that "early second-wave feminism as well as earlier feminism, was highly insensitive to class, racial, religious, and other pertinent differences among women, and this neglect needed to be redressed".[395] Feminists of colour essentially argue that women of other cultures have "previously been 'constructed' falsely by Western feminists" who could not possibly understand the social, cultural and economic issues affecting women of other cultures.[396] They charge white feminism with being condescending to women of other cultures whom they perceive as accepting of oppressive cultural norms. Feminists of colour argue that such value judgment is

[393] UN 'Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women' (10 April 2006) CEDAW/SP/2006/2 12.
[394] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 345.
[395] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 665.
[396] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 345.

based upon western social and moral norms with no attempt at sincerely engaging with the norms of foreign cultures in order to understand them, thus failing to evaluate "the real moral meaning" behind their practices.[397] According to feminism of colour, such practices do not exist independently of the whole cultural way of life where they are practiced, but derive legitimacy in relation to other interrelated traditions and social norms such as the rituals performed on men and familial structures.[398]

According to Kalev, some of the reasoning of feminism of colour that "there are no objective moral standards" appears to support practices such as FGM, since the inference is that FGM is therefore not objectively wrong if there are no objective moral standards.[399] Furthermore, FGM is not particular to non-Western countries but has in fact been practiced in the west. As discussed in chapter two, clitoridectomy was used in Victorian England and America as recently as 1945, in accordance with the "theory of reflex neurosis to treat depression, masturbation and nymphomania".[400] Feminists of colour maintain that continuation of FGM in the global south, is not necessarily due to male oppression and control of women's sexuality, but that in many places it persists simply because it is a traditional norm that is taken for granted, similar to male circumcision which is a norm in other communities.[401]

While Kalev concedes that feminism of colour raises valid and important points such as the complexities of culture, she argues, however, that "their own views are as oversimplified as

[397] Ibid 346; L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 328.
[398] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 346.
[399] Ibid 347.
[400] Hilary Burrage, *Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 84.
[401] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 347.

they claim others to be".[402] According to Kalev, their standpoints depict cultural minorities as being more "unified and unanimous in their opinions" than is the reality, thus effectively failing to recognize that within any group, there are those who agree with the group's norms and those who disagree and want change.[403] In that sense, feminism of colour essentially commits the same crime it accuses western feminism of. Such views of internal accord within cultures, amount to "essentialising culture"[404] or "cultural essentialism" and is one of the critiques of multiculturalism.

Narayan argues that whilst feminism of colour arose to challenge the "essentialist generalization of 'all women'", that that has now been "replaced by culture-specific essentialist generalizations that depend on totalizing categories such as 'Western culture', 'non-Western cultures', 'Indian women', and 'Muslim women'".[405] These perceived categories of women remain "fundamentally essentialist, depicting as homogeneous, groups of heterogeneous people, whose values, ways of life, and political commitments are internally divergent".[406] Narayan calls this phenomenon, the "Package Picture of Cultures" in which cultures are depicted as "neatly wrapped packages, sealed off from each other, possessing sharply defined edges or contours, and having distinctive contents that differ from those of other 'cultural packages'".[407] According to Narayan, the Package Picture of Cultures is problematic for a number of reasons: -

[402] Ibid.
[403] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 347.
[404] L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case W Res L Rev 282.
[405] Uma Narayan, 'Undoing the "Package Picture" of Cultures' (2002) 25(4) Signs 1083.
[406] Ibid.
[407] Ibid 1084.

> Firstly, it assumes that the assignment of individuals to specific cultures is an obvious and uncontroversial matter, when in fact it is more complicated than assumed and is affected by numerous, often in-compatible, political projects of cultural classification. Secondly, it mistakenly sees the centrality of particular values, traditions, or practices to any particular culture as a given and thus eclipses the historical and political processes by which particular or practices have come to be deemed central components of a particular culture. Thirdly, it obscures how projects of cultural preservation change over time. [408]

Indeed, Phillips asserts that "de-essentialised notions of culture, stress that cultures are not bounded, cultural meanings are internally contested, and cultures are not static but involved in a continuous process of change".[409] Kalev cautions that there is danger of "feminism of cultural relativism" which results in the preservation of cultural norms that violate the human rights of women, thus "abandoning the original feminist goals of promoting equal rights for women".[410] Similarly, Okin raises concern over the failure of feminists to confront cultural practices that are oppressive to women. She asserts that there is "a paralyzing degree of cultural relativism" by feminists, which she argues is the result of an "excessive amount of deference to differences among women, coupled with a hyper-concern to avoid cultural imperialism".[411] Narayan therefore suggests that: -

[408] Uma Narayan, 'Undoing the "Package Picture" of Cultures' (2002) 25(4) Signs 1084.
[409] Anne Phillips, *Multiculturalism Without Culture* (Princeton University Press 2009).
[410] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 347.
[411] Susan M Okin, 'Feminism and Multiculturalism: Some Tensions' (1998) 108(4) Ethics 665.

> Giving up the Package Picture's view of cultural contexts as homogeneous helps us see that sharp differences in values often exist among those described as members of the same culture while among those described as 'members of different cultures' there are often strong affinities in values, opening up liberating possibilities with respect to cross-cultural feminist judgments.[412]

Whilst the acknowledgment of difference among women is necessary for true understanding and comradeship, feminism and by large multiculturalism, must be wary of essentialising culture. This is all the more important in the context of FGM, as eradication of the practice can be severely hampered if the status quo is maintained in the name of respecting culture.

4.8 Conclusion

As stated at the outset, this chapter sought to examine the issue of cultural diversity (multiculturalism) by engaging with the claims/debates relevant to FGM that exist within the ideology of multiculturalism. This was an essential basis from which to build our discussion of multiculturalism with the respective Mediums of England and France, set out in the next chapters. In particular, it was necessary to address the claims of cultural relativism – often portrayed as cultural sensitivity – a recurring issue that both France and England encounter in their response to FGM. It was essential for the reader to understand what cultural relativism

[412] Uma Narayan, 'Undoing the "Package Picture" of Cultures' (2002) 25(4) Signs 1086.

entails in respect to FGM and some of the supporting (group rights, feminism of colour) and competing claims (universal human rights).

In addition this chapter has briefly introduced the distinct integration models of France and England, viz, the assimilationist and multiculturalist models respectively, and these will be discussed at length below. In summary, this chapter has set the foundation for the more focussed investigation of France and England's integration models, and how they shape the Medium and systemic response to FGM, ultimately leading to resolving the research question: why prosecution outcomes differ so significantly in France and England.

APPROACHES TO MULTICULTURALISM IN ENGLAND AND FRANCE – CONTRASTING MEDIUMS

5.1 Brief Overview of Chapters Five & Six

In the previous chapter, we explored a range of theories of multiculturalism, and their legal and social implications for practices such as FGM, which in the two contexts of our study primarily affect girls and women within some cultural and ethnic minority communities. In this next phase of our discussion, we will consider how the dominant models of integration designed to respond to multiculturalism within the English and French paradigms, shape the Mediums of those state settings and influence the manner, form and efficacy of prosecuting perpetrators of FGM. Undertaking this analysis requires an understanding of the human geography and sociological factors at play.

As previously discussed, migration patterns have led to significant changes in the ethnic composition of England and France. Guiné and Fuentes aptly refer to this pattern of migration as the "colonial inheritance".[413] Such ethnic and cultural diversity in society is often associated with the concepts of assimilation and integration. As we have seen, assimilation requires the immigrant to yield their cultural and religious distinctiveness and adopt the values and norms of the host society. This differs from integration, where immigrants may retain their religious and cultural particularities, in so far as these particularities are in harmony with the wider

[413] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 479.

society.[414] Whether a country adopts a policy of integration or assimilation in response to cultural diversity, these different models will be based upon their particular notions of citizenship, pluralism, equality, and tolerance.[415] We will explore the differing philosophies of integration present in France and England, before shining a light on the more specific question of FGM, and then concluding with some comparative analysis in chapters seven and eight.

[414] Smithies B and Fiddick P, *Enoch Powell on Immigration* (Sphere Books 1969) 61.
[415] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 477-519.

CHAPTER FIVE – FRENCH REPUBLICANISM

5.2 Section One

This chapter explores French republicanism, as a key element of the French Medium for the purposes of this study, and then moves on to look at the legal action which has taken place in respect of FGM, bearing in mind this cultural backdrop. The discussion of the excision cases also provides a natural moment to introduce the Human Catalyst, and consider her impact in the development of the State response to the problem of FGM.

French republicanism is popularly and distinctly a French particularity. Despite numerous changes in regime and periods of armed conflict, not to mention the schismatic cultural and technological shifts of the last two centuries, the slogan of *liberté*, *égalité* and *fraternité* which resonated with the revolutionaries of 1789 still beats in the heart of the current Fifth Republic.[416] Conceived by the Jacobins and drawn from the philosophies of Rousseau, this triune commitment is a core part of French identity. It is important to note, however, that there is no monolithic notion of French republicanism. Such a notion, especially given the history of France which spanning eleven distinctive regimes since the *Ancien Régime* fell (a *Directoire*, a consulate, two empires, two monarchies, and five republics, as well as the Vichy regime during World War II[417]) would be false, unrealistic, and even essentialist.

[416] Sylvain Brouard, Andrew M Appleton and Amy G Mazur (eds), *The French Fifth Republic at Fifty* (Palgrave Macmillan 2009) 17.
[417] Library of Congress, 'Creating French Culture' https://www.loc.gov/exhibits/bnf/bnf0006.html accessed 16 June 2022.

French republicanism is firmly based upon the principle of equality under French Constitutional Law. It is expressed in the foundational text of the 1789 *Déclaration des droits de l'homme et du citoyen*[418] (Declaration of the Rights of Man and of the Citizen), the Preamble of the 1946 Constitution, and the 1958 Constitution, collectively termed the *bloc de constitutionnalité* (the body of constitutional rules).[419] Article 1 of the *Déclaration* states, *"Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur des considérations de bien commun."* (Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good). Universalism is also a crucial aspect of the French republican model. As Schor remarks, "Achieving French identity requires as the wages of assimilation, the renunciation of public cultural particularism in the name of France's vaunted particularity, its 'singularity,' in short, its universalism".[420] The principle of universalism is in fact enshrined in the constitution. Article 1 of the French Constitution provides that France shall be an "indivisible, secular, democratic and social Republic and shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion".[421]

Although French universalism has no official standard history, it is seen as intimately bound with the Revolution of 1789, an appropriation of the Enlightenment philosophies which themselves inspired the political imaginings of the French Revolution.[422] According to Schor,

[418] *Declaration des droits de l'homme et du citoyen: décrétés par l'Assemblée nationale, dans les séances, des 20, 21, 25 et 26 aout 1789, sanctionnés par le roi*.
[419] Jeremie Gilbert and David Keane, 'Equality versus fraternity? Rethinking France and its minorities' (2016) 14(1) International Journal of Constitutional Law 884.
[420] Naomi Schor, 'The Crisis of French Universalism' (2001) 100 Yale French 50.
[421] French Constitution 1958; *La France est une République indivisible, laïque, démocratique et Sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origines*..
[422] Naomi Schor, 'The Crisis of French Universalism' (2001) 100 Yale French 43.

"universalism, and never more so than in its Enlightenment incarnation, was grounded in the belief that human nature, that is rational human nature, was a universal impervious to cultural and historical differences".[423] Interestingly, pre-Revolution France was multicultural. As Wihtol De Wenden delineates, there were five distinct regions[424] in France with their own languages, internal customs, and freedom of circulation of goods.[425] This diversity, however, caused "reluctance of regional parliaments to abide by the law, difficulty of understanding among the population and the obstacles to exchanges arising from various customary rights" which made the exercise of royal power inconsistent.[426] Leading up to the Revolution, it was generally felt that France was disunited and it needed to become one. The author of *Lettres angloises* published in 1788, wrote that "the French perceive quite well that they are not a nation; they want to become one"; while a political pamphlet stated "this people, assembled out of a multitude of small, different nations, do not amount to a national body"; and *comte de* Mirabeau (one of the prime movers behind the Revolution) famously said in 1789, *"le royaume n'est encore qu'un agrégat de peuples désunis"* (the kingdom is still only an aggregate of disunited peoples).[427] The Revolution therefore tried to change the definition of the French community, from "an accumulation of cultures and institutions constitutive of the state, to a philosophical and political definition of national cohesion around the nation and the citizens,

[423] Naomi Schor, 'The Crisis of French Universalism' (2001) 100 Yale French 46.
[424] "Normandy, Ile-de-France, Picardie, Anjou, Maine, Champagne, Bourgogne, Bourbonnais, Berry, Poitou; the so-called foreign provinces (*provinces réputées étrangères)* and the provinces under foreign allegiance (*provinces à l'instar de l'étranger effectif)* – Alsace, Lorraine; three bishoprics – the provinces under feudal links with the King of France (Brittany, Béarn, Provence); a small kingdom – Navarre; and a province wishing to be ruled by its own natives – Artois".
[425] Catherine Wihtol De Wenden, 'Multiculturalism in France' in Mathias Koenig, 'Multiculturalism and Political Integration in Modern Nation-States' (2003) 5(1) International Journal on Multicultural Societies 77.
[426] Ibid.
[427] Cited in David A Bell, 'The Unbearable Lightness of Being French: Law, Republicanism and National Identity at the End of the Old Regime' (2001) 106(4) the American Historical Review 1218.

free and equal in their rights".[428] French republicanism evolved onwards from the nineteenth century with references to republican values, cancelling particularistic belongings, obscuring community boundaries and gradually building France as a homogenous nation.[429]

The republican project has largely been successful in ingraining itself into the soul of France. Indeed, present-day France is said to represent the "archetypal republican model" where citizens are deemed as "equal political actors" independent of any cultural, ethnic, or religious specificities.[430] The French believe that the universalist agenda can only be achieved, and indeed, can only survive if there is the "erosion of particularisms".[431] This conceptualised equal treatment of all citizens before the law, is one way in which the republican model differs from the multiculturalist model, at least in the abstract sense. This contrast between republican and multiculturalist ideology is premised on the reasoning that "the universal attribute" would not exist if citizens were treated collectively and not individually.[432] The granting of special rights to minority groups would mean that there is no law in common for all, a notion that goes against republican values and norms that place the rights of individuals above those of a group.[433] This, indeed, is the spirit of French republicanism, it equates freedom with the non-domination of the individual.[434] This can be traced to the Revolution that first defined French

[428] Catherine Wihtol De Wenden, 'Multiculturalism in France' in Mathias Koenig, 'Multiculturalism and Political Integration in Modern Nation-States' (2003) 5(1) International Journal on Multicultural Societies 77.
[429] Ibid.
[430] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 69.
[431] Michèle Tribalat, 'The French "Melting Pot"' in Susan Milner and Nick Parsons (eds) *Reinventing France* (Palgrave Macmillan 2003) 130.
[432] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 239.
[433] Ibid.
[434] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 69.

citizenship as "an institution simultaneously promoting social justice and indifferent towards any type of distinction".[435] Plainly, the French republican model of integration, requires immigrants to abandon their cultural and ethnic particularisms and assimilate into the French way of life so as to become 'good Frenchmen'. The French way of life encapsulating, "French culture, language, mentality, and even character".[436]

According to Guiné and Fuentes, French citizenship appears to be inextricably linked to the French national identity since the immigrants are required to first fully adopt French culture in order to be "integrated in the national community and enjoy citizenship rights".[437] They assert that this style of incorporation has been labelled as "ethnocentric assimilation" and is coherent with the French republican model that portrays a homogenous nation that is centralized and secular, which does not recognize the existence of "particularist mediations" between the citizens and state's institutions.[438] Tribalat, a French demographer and researcher, defines assimilation as a "social process resulting from populations of foreign origins adapting their behaviour and learning the founding principles of the nation and the customs of the host society".[439] To illustrate the foregoing, Tribalat describes the process of naturalisation by decree as follows:

> [It] includes an investigation carried out by the *prefecture* into the candidate's morality, loyalty and assimilation. This investigation verifies that the candidate's competence in

[435] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 69.
[436] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 489.
[437] Ibid 490.
[438] Ibid 489.
[439] Michèle Tribalat, 'The French "Melting Pot"' in Susan Milner and Nick Parsons (eds) *Reinventing France* (Palgrave Macmillan 2003) 129.

> French is sufficient for everyday life, and enquires into the candidate's interest in the host society through his or her personal and professional sociability and respect of French customs and practices. Failure to assimilate, is a reason for rejection of requests for naturalization.[440]

Brunstetter identifies the *Contrat d'Accueil et d'Intégration* (Contract of Welcome and Integration), as "the keystone of France's revamped immigration paradigm aimed at integrating immigrants into French society and fostering social cohesion".[441] He explains what the "immigrant contract" entails as follows: -

> Its legitimacy rests on appeals to the universal values of the Enlightenment—the motto Liberty, Equality, Fraternity—and tacit appeals to Rousseauian notions of consent, civic solidarity and duty in the form of a social contract which immigrants must sign to obtain long-term residency. The purpose of the immigrant contract is to ensure immigrants' willingness to integrate into French society by committing to learn about the values and institutions of the French Republic (which may be significantly different from their own) and the French language.[442]

The immigrant contract is only one example of reference to republican values as a means of confronting the issues of immigration and social diversity. Actors across the political spectrum have couched discourse in these terms, including extremist voices. For example, in the 1980s

[440] Michèle Tribalat, 'The French "Melting Pot"' in Susan Milner and Nick Parsons (eds) *Reinventing France* (Palgrave Macmillan 2003) 129.
[441] Daniel Brunstetter, 'Rousseau and the tensions of France's *Contrat d'Accueil et d'Inte´gration'* (2012) 17(1) Journal of Political Ideologies 107.
[442] Ibid 107.

Jean Marie Le Pen, far-right politician and then president of the National Front, "framed immigration in nationalistic and culturally exclusive terms" using rhetoric about the Republic.[443] According to Favell, the "end-goal" of the French model of integration, is to create an "ideal-type" immigrant, whereby the immigrant becomes fully French, so that the enjoyment of his/her freedoms is entirely aligned with the French national identity, "without any externalities not captured within the overall cadre of the nation-state".[444]

5.3 French Republicanism vs Multiculturalism

It follows that multiculturalism, which acknowledges cultural difference and supports group-specific rights, is the counter-example of French republicanism, and is therefore undesirable in a nation with longstanding resistance to divided loyalties and social distinctions. As Wihtol De Wenden summarises, in France, "the right to be different, the pluralism of allegiances, the plural citizenship model, the intercultural relations projects, the expression of groups and minorities as referring to a France of minorities, are still to some extent taboo".[445] Simply put, multiculturalism is "un-French, because it places culture before politics and groups before individuals".[446]

[443] Daniel Brunstetter, 'Rousseau and the tensions of France's *Contrat d'Accueil et d'Inte´gration'* (2012) 17(1) Journal of Political 110.
[444] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 79.
[445] Catherine Wihtol De Wenden, 'Multiculturalism in France' in Mathias Koenig, 'Multiculturalism and Political Integration in Modern Nation-States' (2003) 5(1) International Journal on Multicultural Societies 78.
[446] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 66.

The following is a public incident that illustrates how the French perceive 'French identity' and their aversion to multiculturalism. On 15 July 2018, France were crowned world champions after defeating Croatia 4-2 in the World Cup finals. On the 17 July 2018, Trevor Noah, renowned comedian, joked that it was an "African victory" on his satirical show – The Daily Show. The joke was a nod to the African heritage of more than half the French players, but it triggered controversy in France, and the comedian was accused by some of racism. Trevor Noah's joke provoked a stern response from the French Ambassador to the United States, Gérard Araud, who wrote to the comedian saying his comment denied the players' "Frenchness". The Ambassador wrote in a letter on the 18 July 2018: -

> The rich and various backgrounds of these players is a reflection of France's diversity. France is indeed a cosmopolitan country, but every citizen is part of the French identity and together they belong to the Nation of France. Unlike in the United States of America, France does not refer to its citizens based on their race, religion or origin. To us, there is no hyphenated identity, roots are an individual reality. By calling them an African team, it seems you are denying their Frenchness. This, even in jest, legitimizes the ideology which claims whiteness as the only definition of being French.[447]

Reference to this 'viral' incident, is particularly relevant to the discussion as it demonstrates to an extent, French attitude to the issue of multiculturalism in the present day. The dominant republican narrative borne in the French Revolution, portrays France as a united Republic

[447] France24, 'Trevor Noah, French ambassador in row over 'Africa' World Cup win' (19 July 2018) https://www.france24.com/en/20180719-trevor-noah-french-ambassador-araud-africa-world-cup-france accessed 9 May 2022; BBC News, 'Trevor Noah defends 'Africa won the World Cup' joke' (19 July 2018) https://www.bbc.com/news/world-africa-44885923 accessed 9 May 2022.

whose citizens are abstract and 'culturally neutral'.[448] Is this what the French Ambassador meant by "the French identity"? According to Amiraux, the French firmly believe that social justice can only be achieved by considering individuals as "abstracted from what differentiates them".[449] An understanding of French identity therefore must include the notion of colour and culture blindness.[450] The foregoing fervent response by the French Ambassador, one might say, is a reflection and representation of the attitude of a "singular oneness and sameness",[451] and of France's ostensible disregard for the particularisms and importance given to cultural difference that is associated with multiculturalism in its ideological-normative referent. Traditionally, the terms "cultural diversity" (*la diversité culturelle*) or simply "diversity" (*la diversité*) have been preferred to multiculturalism;[452] and even its descriptive use has only recently entered academic and political discourses in France.[453]

Why has French republicanism in its traditional theoretical sense remained so influential to the present day? To answer this question, we must first ask what French republicanism means to the French. Going back to the Revolution, although Rousseau's philosophies greatly influenced the Revolution, historians argue that his philosophies, viz. the Social Contract and the General Will, were only superficially interpreted and implemented by the revolutionaries

[448] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 67; See also, Pierre Rosanvallon, *Le Peuple Introuvable: Histoire de la représentation démocratique en France* (Gallimard 1998).
[449] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 69.
[450] Ibid.
[451] Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press 2007) 16.
[452] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 236.
[453] Constant F, *Le multiculturalisme* (Flammarion 2000) 17.

without "attempt to penetrate [their] complexities and extraordinary abstraction".[454] Rosas avers that whilst Rousseau's influence "was more symbolic than concrete in nature", it gave the revolutionaries the foundation upon which to base a new French nation-state.[455] Given the watershed moment of the Revolution, it is hardly unreasonable to say that it defines French culture to this day. But just as with the implementation of Rousseau's philosophies, what was envisioned by the republican ideals of universalism, equality and secularism appears to be more symbolic than concrete in application. The insistence on an assimilationist model of integration without regard to the complexities of a culturally diverse population is a somewhat convoluted example of this – convoluted because the refusal by the French to acknowledge cultural difference in the name of equality is in fact the cause of inequality. For instance, Brouard et al argue that the republican values and principles that immigrants are required to integrate into are essentially called into question by the "proliferation of exclusionary trends" particularly in security and policing, whereby current anti-terrorist legislation[456] may encourage a policing regime that is arguably averse to the 'Other', particularly "the Muslim 'enemy side'" who are then targeted and victimised.[457]

As will be discussed below, this complexity has led to accusations of marginalisation and discrimination by immigrants, the polar opposite of what these republican ideals intended. The intention of assimilation, Tribalat argues, is to "reduce tensions over essential values

[454] See François Furet, 'Rousseau and the French Revolution' in Clifford Orwin and Nathan Tarcov (eds) *The Legacy of Rousseau* (University of Chicago Press 1997) 178. See also, Joan McDonald, *Rousseau and the French Revolution* (Athlone Press 1965); Alfred Cobban, *Rousseau and the Modern State* (George Allen and Unwin 1934).
[455] Alexander S Rosas, 'Diversification of the Republic: Cultural Diversity in Contemporary France' (DPhil thesis, University of California, Berkeley 2011).
[456] *LOI n° 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne*.
[457] Sylvain Brouard, Andrew M Appleton and Amy G Mazur (eds), The French Fifth Republic at Fifty (Palgrave Macmillan 2009) 282.

(secularism, equality and in particular gender inequality)".[458] And according to her, the assimilation model itself is not at fault for any societal dysfunction. The cause of such dysfunction, she argues, is the result of problems within French institutions, their inability, particularly in schools, to "produce citizens who are free of communitarian identities and who subscribe to the founding principles on which national cohesion lies (secularism, equality) or because these principles are scorned and reality is drifting dangerously away from the myth of republican equality".[459] This kind of outlook is an indication of what French republicanism means to the French and the esteem to which it is held.

Despite the fact that France is indisputably a multicultural society, multiculturalism as a notion remains fiercely contested. As Guérard de Latour observes, "*Il suffit qu'on l'évoque pour qu'un rejet multiforme s'exprime, qu'il traduise le refus du modèle de société américaine, communautariste et ghettoïsée, les craintes associées*." (It is enough to evoke a multifaceted rejection of the American model of society, which is communitarian and ghettoised, and the fears associated with it.)[460] Scott argues that the French seemingly view American multiculturalism negatively as the embodiment of communalism. In France, "*communautarisme* refers to the priority of group over national identity in the lives of individuals; in theory there is no possibility of a hyphenated ethnic/national identity—one belongs either to a group or to the nation".[461] Therefore, French universalism "– the oneness, the sameness of all individuals – is taken to be the antithesis of communalism, … where

[458] Michèle Tribalat, 'The French "Melting Pot"' in Susan Milner and Nick Parsons (eds) *Reinventing France* (Palgrave Macmillan 2003) 129.
[459] Ibid 130.
[460] Sophie Guérard de Latour, *Vers la République des différences* (Presses Universitaires du Mirail (2009) 9.
[461] Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press 2007) 16.

hyphenated identities (Italian-American, Irish-American, African-American, etc.)", are permitted and granted legitimacy and political influence.[462]

The French republic has internationally demonstrated its non-recognition of minority group rights by entering a reservation to article 27 of the ICCPR which provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".[463] The reservation was made on the grounds that "France is a country in which there are no minorities, and where the chief principle is non-discrimination".[464] France has also refused to ratify the European Charter of Regional or Minority Languages[465] finding that it is unconstitutional.[466]

Accordingly, in this 'anti-minority group rights' climate, there can be no political accommodation of multiculturalism in its empirical sense and thus affirmative action programs such as in the US are considered incompatible with the constitution.[467] Indeed, Villard and Sayegh observe that in France, the ideology of multiculturalism has never been

[462] Ibid.
[463] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[464] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press 2008) ch 2.
[465] Council of Europe, European Charter for Regional or Minority Languages (4 November 1992) ETS 148.
[466] Gerard-René de Groot, 'European Charter for Regional and Minority Languages' in Tanneke Schoonheim and Johan Van Hoorde (eds) *Language variation: A factor of increasing complexity and a challenge for language policy within Europe* (EFNIL 2019) 116.
[467] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 490.

popular, particularly among the political elite.[468] Time and again politicians have lauded the importance of upholding republican principles and eschewing multiculturalism. Former President Chirac declared that "France 'would lose her soul' if she went the way of an Anglo-American pluralism that recognizes and accepts internal difference".[469] Former President Sarkozy proclaimed in 2011 that multiculturalism had been a failure in France asserting, "The truth is that in all our democracies we have been too concerned about the identity of those who come and not enough about the identity of those who welcome. A person coming to France must be ready to blend into one single community, which is the national community".[470] The following year, former Minister of Interior, Claude Guéant, stated: -

> We want France to remain faithful to its values, its great Republican principles, such as *laïcité* and equality between men and women. We refuse communitarianisms and the secluded life of ethnic or religious communities that follow their own rules, which are neither the rules of the Republic nor of France. It is for that reason that the foreigners we welcome must integrate. It is they who must integrate and not the other way round.[471]

The general gist of these sentiments appears to be that the manifestation of cultural diversity within French society (or any society for that matter), is the antithesis of a unified society with

[468] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 236.
[469] Mayanthi Fernando, 'The Republic's "Second Religion": Recognizing Islam in France' (2005) 235 Middle East Report 12.
[470] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 249.
[471] Ibid.

shared values, and is the cause of internal difference. Villard and Sayegh contend that the conception of France emerging from such public views is a society in which exists a "cultural line" dividing "those who are coming and those who are welcoming".[472] This cultural divide has manifested itself most publicly through the ban on ostentatious displays of religious objects in 2004, and the full-face veil ban in 2010, impacting a large number of immigrants of Muslim faith.[473] These laws have garnered accusations of prejudice, discrimination, and racism and often resulted in ethnic conflict.[474] The underlying cause of these conflicts is cited as discrimination manifest in social and economic exclusion, and the greatest challenge facing the French republic is its ability to effectively address these problems, whilst maintaining its distinctive republican model of integration.[475]

The posture of 'colour-blindness' has been criticised for inadvertently creating an environment that fosters discrimination, particularly indirect discrimination. It is important to note, however, that France has made efforts to combating racial and other forms of discrimination; it has enacted anti-racist legislation such as Articles 225 and 432 of the *Code pénal* on racist and discriminatory behaviour, the anti-discrimination Law of November 2001, the Gayssot Law[476] on hate speech and the Law of 21 June 2004 on racist propaganda via the internet.[477] Nonetheless, some of its laws and policies that are meant to promote colour-blindness actually limit the state's ability to combat indirect discrimination. The prohibition on collecting

[472] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 251.
[473] *LOI n° 2004–228 du 15 Mars 2004; LOI n° 2010-1192 du 11 Octobre 2010.*
[474] Items, 'Riots in France' (18 November 2005) https://items.ssrc.org/category/riots-in-france/ accessed 17 June 2022.
[475] Ibid.
[476] Law of 13 July 1990.
[477] Sylvain Brouard, Andrew M Appleton and Amy G Mazur (eds), *The French Fifth Republic at Fifty* (Palgrave Macmillan 2009) 277.

racial and ethnic data is one way in which the French republic effectively ties its own hands, and there is ongoing debate concerning the efficacy of such a law as will be shown below.

At this juncture, a pertinent question is posed: is the French republican model of integration discriminatory for its strict requirement of assimilation? The foregoing statement on the cause of ethnic conflict highlights the tough challenge the France faces in its capacity to deal with these claims *while* maintaining its distinctive republican model. But perhaps the better question is, is the French universalist vision of a society of singular oneness and sameness actually attainable? Scott argues that while "sameness is an abstraction, a philosophical notion meant to achieve the formal equality of individuals before the law," historically in France, "it has been applied literally: assimilation means the eradication of difference".[478]

An illustration of this assertion and the literal application of French universalism to the law, is the *Loi Informatique et Libertés* (Law for Data Protection) which limits the collection of statistical data: -

> The 1979 *Loi Informatique et Libertés* severely restricts the collection of data that could be used to threaten individual liberties (religion, party membership, trade union affiliation), or to question the idea of the national community of citizens (nationality, origin). The *Commission Nationale Informatique et Libertés* (National Commission for the Protection of Data) is responsible for monitoring the correct use of information considered sensitive, including data on nationality or any other aspect that could be

[478] Joan Wallach Scott, *The Politics of the Veil* (Princeton University Press 2007) 16.

used, even if indirectly, to show the racial origin or the religion of the people included in those databases.[479]

The prohibition is grounded on the constitutional principle of equality. Allowing the collection of such data would imply that the citizens of France are not equal, and it would acknowledge the existence of cultural difference. This reasoning was affirmed by the Constitutional Court in a 2007 decision[480] which upheld "the unconstitutional nature of any data collection process that would rely on grounds such as race or ethnic origin, stated to be a violation of article 1 of the 1958 Constitution".[481]Accordingly, the official census places French residents under one of three classifications: (1) French by birth; (2) French by naturalization; and (3) foreign.[482] These classifications make it difficult to determine national, religious, and ethnic origins. Despite the creation of *Haute autorité de lutte contre les discriminations* (High Authority for the Fight against Discrimination and for Equality, HALDE) in 2004 with the mission to help victims of discrimination[483], "the strong opposition to the use of 'ethnic statistics' further exemplifies how republican principles limit the implementation of policies of recognition … the type associated with multicultural politics".[484] It has been argued that the ban on collecting ethnic data, and indeed the refusal to pay attention to cultural diversity in the tradition of

[479] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 491.
[480] Decision no. 2007-557 DC of 15 November 2007.
[481] Jeremie Gilbert and David Keane, 'Equality versus fraternity? Rethinking France and its minorities' (2016) 14(1) International Journal of Constitutional Law 889.
[482] Riva Kastoryano, *Negotiating Identities States and Immigrants in France and Germany* (Barbara Harshav tr, Princeton University Press 2002) 23.
[483] Sylvain Brouard, Andrew M Appleton and Amy G Mazur (eds), *The French Fifth Republic at Fifty* (Palgrave Macmillan 2009) 278.
[484] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 245.

republican universality, impedes the state's ability to have a precise understanding of issues relating to race and ethnicity in the multi-ethnic, contemporary France.[485]

There has been debate on the "legality of collecting ethnicity data" with French government spokesperson, Sibeth Ndiaye, calling for a change in the law, so that the country can see "the reality" of race. She argues that French laws are founded on "republican universalism" without acknowledging the realities of real life. Using the data, according to Ms Ndiaye, could help "fight back against a tireless battle that is economic and social, democratic and republican".[486] Her proposal, however, has been met with opposition. Bruno Le Maire, Minister for the Economy, said: "I remain against the ethnicity statistics, which don't correspond with the idea of French universalism, and the fact that a French person is a French person. I don't see their race, origin or religion; and I don't want to." President Emmanuel Macron has also said that the subject is not up for debate "at this stage".[487] It would thus appear that "sameness" is impractical given the proposal to change the law on demographics or the call by French Muslims for the state to allow a more inclusive, liberal *laïcité* which allows for the "right to difference".[488]

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[485] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 491. See also, Patrick Simon and Valérie Sala Pala, 'We're not all multiculturalists yet: France swings between hard integration and soft anti-discrimination' in Steven Vertovec and Susanne Wessendorf (eds) *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Taylor & Francis Group 2010) 103.

[486] Sibeth Ndiaye, 'Today we are paying for the erasure of republican universalism' *Le Monde* (13 June 2020) https://www.lemonde.fr/idees/article/2020/06/13/sibeth-ndiaye-nous-payons-aujourd-hui-l-effacement-de-l-universalisme-republicain_6042708_3232.html accessed 16 May 2022.

[487] Joanna York, 'France debates legality of collecting ethnicity data' *The Connexion* (16 June 2020) https://www.connexionfrance.com/article/French-news/Collection-of-ethnic-data-debated-in-France accessed 16 May 2022.

[488] Ruud Koopmans et al, *Contested Citizenship: Immigration and Cultural Diversity in Europe* (University of Minnesota Press 2005) 170.

Why then does the French republic persist with anti-multiculturalism rhetoric despite the manifestation of cultural difference in society? What appears to be a common view in academic discourse in response to this question, is primarily the issues of immigration and Islam. Guérard de Latour claims that the fears associated with multiculturalism come from a fear of "*au retour du fondamentalisme islamique, ou plus largement la peur de l'étranger dans le context d'une immigration jugée de plus en plus envahissante* (the return of Islamic fundamentalism, or more broadly the fear of the foreigner in the context of what is seen as increasingly invasive immigration).[489] Bourdieu on the other hand avers: -

> In projecting on this minor event … of the *voile*, great principles of freedom, *laïcité*, women's liberation, etc., the eternal pretenders to the title of master-thinkers have delivered, as in a projective test, their undisclosed positions on the problem of immigration, such that the explicit question—Should wearing the 'Islamic' *voile* be accepted at school?—hides the implicit question—Should immigrants of North African origin be accepted in France?[490]

Bowen, in his book "Why the French don't like Headscarves" puzzles over our question albeit with a specific focus on the Muslim headscarf affair. He suggests that the Republic fears that the "emergence of a public Islam" undermines the notion of a public space free from religious and cultural influences, particularly in public schools which are republican institutions that "model for their pupils the erasure of differences and the collective embrace of the

[489] Sophie Guérard de Latour, *Vers la République des différences* (*Presses Universitaires du Mirail* 2009) 9.
[490] Pierre Bourdieu, *Interventions Politiques* (1961-2001) (Marseille Argone 2002) 305.

Republic".[491] On a fundamental level, Bowen suggests that the republican way of thinking or its ethos, is similar to any society's, that there must be agreement on basic values for people to coexist in a society.[492] Such a stance would be accepted as fair by a reasonable person, but what makes French republicanism stand out, is it seeks to uphold this idea of shared values and beliefs consistently and rigorously, over individual interests and pluralism.[493] French philosopher, Blandine Kriegel, then Chairperson of the High Council of Integration, emphasized France's distinctive approach to society as follows: -

> We hold strongly to the principle of *laïcité*. We have to place ourselves in the public space, by abstracting from our individual characteristics, from where we came from, our roots. This is the idea of the social contract. Here in France each individual has to abstract her/himself from those traditions and accept the transfer of certain rights to the Law. That is the contract: we move from pluralism to unity through consent.[494]

How has France maintained its distinct republicanism for which it is famously known? The answer lies in public education: "Education is the main public instrument of cultural and civic socialization and as such is a major public institution both for the inclusion of ethnic minorities into society and for the shaping of a civic and national identity".[495] In France, schools have indeed been a "powerful tool of homogenisation and socialisation" in a culturally diverse

[491] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 243.
[492] Ibid.
[493] Ibid 21.
[494] Ibid 22.
[495] LOCAL MULTIDEM project, 'Muslim identities and the school system in France and Britain: The impact of the political and institutional configurations on Islam-related education policies' (ECPR General Conference Pisa 2007).

society.[496] Bowen refers to them as "institutions of integration, centrally designed to create uniformity" whose function is to "instruct and exemplify" what it means to be a French citizen.[497] Post-Revolution, schoolteachers were tasked with the role of turning "peasants into Frenchmen",[498] teaching the language of the dominant culture and its republican values. The formative years of a child's life are paramount to shaping their worldview, and for a nation that is especially committed to safeguarding its republican principles, it is reasonable that it would employ public education as a tool to develop their civic socialisation. Bowen puts it this way, "the public school works by encouraging pupils to leave their particular forms of identity at the door and approach learning only as future citizens of France".[499] This also explains France's determination (to the point of legislation) on maintaining a secular space in public schools free from religious and cultural influences. On the other hand, one could argue that instructing pupils on how to be 'good Frenchmen' is a cultural and somewhat 'religious' influence of its own merit, given the authority and reverence with which French republicanism, particularly the principle of *laïcité* is held. The General Secretary of the *Union des Organisations Islamiques de France* (UOIF) stated as much in a speech: "*Laïcité* must not be allowed to become a new religion, but a neutral space where liberty is given to everyone".[500]

[496] Catherine Wihtol De Wenden, 'Multiculturalism in France' in Mathias Koenig, 'Multiculturalism and Political Integration in Modern Nation-States' (2003) 5(1) International Journal on Multicultural Societies 80.
[497] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 21.
[498] Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870-1914* (Stanford University Press 1976).
[499] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 239.
[500] Ruud Koopmans et al, *Contested Citizenship: Immigration and Cultural Diversity in Europe* (University of Minnesota Press 2005) 170.

5.4 Assimilation vs Integration

Although the terms assimilation and integration are often used interchangeably, particularly in the public arena, there was deliberate attempt to detach the two in the 1980s. A new policy of integration was implemented, "replacing the old project of assimilation", implying "a more subtle, interactive and subjective process for the immigrant in his or her identification with the values and norms of society".[501] According to Amiraux, there was opposition between two concepts: "*droit à la différence* (right to be different) and *droit à l'indifférence* (right to be treated with indifference)" and these two conceptions "epitomized what was at stake in defining a French avenue for integration".[502] In 1989 the *Haut Conseil à l'Intégration* (High Council for Integration) was created institutionalizing integration as a political project. Its reports in the 1990s "set out a project of integration that combines voluntary participation and adhesion to the core values of the national identity, but also point to the existence of cultural specificities that are not disqualified".[503] Though there was no explicit mention of multiculturalism nor recognition of group rights, the integration policy sought to establish "a commitment to respect cultural diversity and to struggle actively against territorial discrimination and exclusion".[504]

[501] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 242.
[502] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 76.
[503] Ibid.
[504] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 242.

Amiraux argues, however, that in the French context, integration – defined as "a process of reduction, through acculturation, of the cultural distance of an individual from the French society" – "is never completely dissociated from assimilation".[505] Similarly, Simon and Pala contend that the revamped model of integration "marked a softening of, but not a break with, the assimilationist framework of thought".[506] Immigrants were still perceived as external to the majority group, with the enjoyment of equal rights predicated upon them fulfilling "duties left deliberately vague", which forms the integration controversy, that what is required of immigrants in order to integrate, i.e. become an ideal French citizen, is primarily defined by the majority group.[507]

At this juncture, it is perhaps necessary to ask, is French integration a one-way street? According to Bowen, in France, integration is a term that has different meanings depending on who you ask, to the native French person they are "the reference point" and to the immigrant, they are "the problem".[508] While immigrants are called to integrate into French society, Bowen contends that there are no accompanying calls to the wider society to be tolerant or to "broaden their notions of what is acceptably French".[509] According to Bowen, many immigrants feel that the requirement to integrate, is an imposition of French norms without "respect to different views on religion and family life", and that this has become a barrier between the public official and the Muslim immigrant.[510] Bowen's entire analysis might

[505] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 76.
[506] Patrick Simon and Valérie Sala Pala, 'We're not all multiculturalists yet: France swings between hard integration and soft anti-discrimination' in Steven Vertovec and Susanne Wessendorf (eds) *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Taylor & Francis Group 2010) 95.
[507] Ibid.
[508] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 244.
[509] Ibid.
[510] Ibid.

be subjected to the criticism that it is rooted in an implicit assumption that the ordering of priorities in the French metanarrative, or Medium, is problematic for diverging from the ordering of priorities in the US and UK paradigms. Bowen critiques France for closing the door on 'legitimate' cultural difference, yet appears to draw the bolt against cultural difference at a constitutional level. Nonetheless, an answer to our question above might be gleaned from the aforementioned comments by former President Sarkozy who stated, "The truth is that in all our democracies we have been too concerned about the identity of those who come and not enough about the identity of those who welcome".[511]

Amiraux challenges the ubiquitous notion of a 'non-multicultural multicultural republic' calling it a paradox.[512] She asserts that in the matter of politics of difference, France is a "complicated case" since it is "a country of migration that does not think of itself as a pluralistic society".[513] According to Wihtol de Wenden, the French reluctance to embrace multiculturalism is set against "the exclusiveness of Jacobin values: secularism, formal equality, legal freedom, civic values of living together (*fraternité*), with an exclusive allegiance to the nation-state Republican model (patriotism)".[514] Underlying these Jacobin values, however, is the growing gap between "historical narratives and practices, and the conflict between political principles and pragmatic implementation".[515] Which is to say, as Amiraux puts it, "While society is entangled in concrete and pragmatic problems, the elites (political,

[511] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 249.
[512] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 66.
[513] Ibid.
[514] Catherine Wihtol De Wenden, 'Multiculturalism in France' in Mathias Koenig, 'Multiculturalism and Political Integration in Modern Nation-States' (2003) 5(1) International Journal on Multicultural Societies 78.
[515] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 66.

intellectual, administrative) still promote an abstract promise of universalism and equality".[516] Koopmans describes the unique challenge posed by France's official blindness to cultural particularisms, or the "hyphenated identity" as the French ambassador put is, as follows: -

> The French approach has difficulty in dealing with the fact that cultural group differences, which are denied as legitimate policy categories, do form the basis of discrimination and racism from the side of the majority population, most clearly voiced by the Front National's polemic against "inassimilable" immigrants. Insisting on the equal treatment of all and loathing group specific approaches, France to some extent ties its own hands when it comes to combating forms of social exclusion that are rooted in ethnic and cultural differences.[517]

French universalism has thus been criticized as "false" and "perverted" as its assimilationist model is effectively "intolerant to the otherness of the other".[518] Universalism and equality, appear to mean different things to the immigrant and the native French, albeit the difference is nuanced and no doubt justifiable to each party. The immigrant is attracted by what they perceive to be the "great strength of the Republic" which they see as "its promise to accept all who wish to become part of France".[519] The reality which confronts the immigrant, however, sullies this perception as it becomes apparent that French republicanism is universal only in so far as 'Otherness' aligns with its own norms, thereby effectively oppressing the

[516] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 66.
[517] Ruud Koopmans et al, *Contested Citizenship: Immigration and Cultural Diversity in Europe* (University of Minnesota Press 2005) 14.
[518] Naomi Schor, 'The Crisis of French Universalism' (2001) 100 Yale French 50.
[519] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 246.

cultural Other. But as Bowen observes, the expectation to set aside cultural particularisms and adopt French culture is justified in the eyes of the French:

> French officials see integration as requiring merely that newcomers to France respect the terms of the Republican pact, by learning the language, rules, norms, and traditions that define France. What is wrong with requiring that immigrants consider men and women to be equal? That they respect the norms of *laïcité* for which so many in France have fought? Put this way, these demands seem legitimate. To have two wives, or to discriminate against women, or to challenge the norms defining the public school, contravene the laws of France and, often, basic Republican values.[520]

The issue of identity is apparent, whereby France demands a singular identity (the French identity) and where the immigrant demands a dual identity – the freedom to maintain their distinct cultural identity and their French identity. This sums up the fundamental difference between French republicanism and multiculturalism in the UK and US. Whilst immigrants do face these legitimate challenges, there is evidence that the French model of integration has proven "unexpectedly successful" with: higher rates of employment showing the incorporation of immigrants into nearly all levels of French economy, higher rates of intermarriage, higher tolerance of immigrants according to opinion polls.[521]

[520] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 244.
[521] Sylvain Brouard, Andrew M Appleton and Amy G Mazur (eds), *The French Fifth Republic at Fifty* (Palgrave Macmillan 2009) 274.

5.5 A Closer Look at *Laïcité*

Like universalism, the principle of *laïcité* (loosely translated as secularity) is at the core of French republicanism. Before the 1905 Law on the Separation of Church and State,[522] the Catholic church had supranational influence in French society. The Concordat of 1801 had "regulated the relationships between the French State and 'recognized religions' and had, in practice, entrenched the political and social power of the dominant Catholic Church".[523] Thus the church exercised a "divine right to rule over the social life of the individuals" which inevitably resulted in "direct competition with the State".[524] Following a head-on opposition, the republicans in power abolished the Concordat and French society finally attained its autonomy which "initially resulted in a restriction of the space institutionally reserved to religion and then in its official deinstitutionalisation".[525] According to Laborde, the 1905 law "embodies a classical ideal of liberal separation between state and religion, underpinned by an individualistic and egalitarian conception of justice as best pursued through state abstention from religious affairs".[526] Similarly, Amiraux asserts that it is through the existence of a secular public space that "the centrality of the individual intertwined with a claim for universalism" is made possible.[527] Accordingly, there exists a stark division between the private and public spheres in French society, whereby the public space is deemed neutral in

[522] *Loi du 9 décembre 1905 Concernant la Séparation des Églises et de l'État*.
[523] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press 2008) ch 2.
[524] Didier Lassalle, 'French Laïcité and British Multiculturalism: A Convergence in Progress?' (2011) 32(93) Journal of Intercultural Studies 230.
[525] Ibid.
[526] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press 2008) ch 2.
[527] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 72.

order to maintain social order, therefore religious and cultural influences are strictly confined to the private sphere.[528]

According to Laborde, *laïcité* contains liberal principles; the "individualistic principle" for examples, upholds the primacy of the individual by stipulating that "(i) group membership should not generate differential treatment of individuals by the state and (ii) if rights are attributed to groups, they should not override the individual rights of their members". Laborde contends that "the official republican reading of *laïcité* is strongly influenced on different levels, by the wider individualistic philosophy of the 1789 Revolution, which strongly asserted both principle (i) and principle (ii)".[529] Villard and Sayegh assert that the orthodox interpretation of *laïcité* signifies "the strict neutrality of the Republic by the exclusion of religious discourses and practices from the public sphere", but in practice, "this fine line is constantly being negotiated, which explains in part why the question of multiculturalism is often directly linked to religion".[530]

In France, the relevant word for religion is *Le culte,* which roughly means "organised religion".[531] *Le culte* is the outward expression of one's relationship with God and involves three elements: "the celebration of *le culte*, as in the mass; its buildings; and the teaching of

[528] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 240.
[529] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press 2008) ch 2.
[530] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 240.
[531] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 26.

its principles".[532] If it goes beyond these three domains and into the public sphere, it threatens public order and can be quashed by the state in order to maintain public order. Vianney Sevaistre, former *Chef du Bureau Central des Cultes* (Chief of the Central Office of Organized Religions) in the Ministry of the Interior, explains that the strict enforcement of *laïcité* is because of history: "In French history, we came out of the religious wars, both Catholics against Protestants and then the Catholic Church against secularists, and then we developed the system of *laïcité*. This limits the freedom of *culte* so as to prevent the re-emergence of wars".[533] *Laïcité* is therefore a cornerstone of French republicanism. The Stasi Commission, established in 2003 to reflect on the application of *laïcité* in the republic, stated: "*La laïcité est constitutive de notre histoire collective*" (secularism is part of our collective history).[534]

But what exactly does *laïcité* mean? The term itself is not even mentioned in the 1905 law and neither does it appear explicitly in France's Constitution.[535] Tolan argues that the French "are quite divided over what it means: [is it] "strict state neutrality in religious matters? State intervention in religious affairs to protect citizens against the Church? Opposition to manifestations of religion in the public sphere?"[536] Weil proffers that *laïcité* was constructed around the principles of "freedom of conscience, separation of state and churches and the equal respect of all faiths and beliefs", and asserts that *laïcité* must be understood within its historical context, otherwise it loses its original intent.[537] He rather controversially contends that under the regime of *laïcité*, the wearing of religious signs is only forbidden to public

[532] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 26.
[533] Ibid.
[534] Bernard Stasi, *Rapport de la Commission de réflexion sur l'application du principe de laïcité dans la République (La documentation française* 2003) 25.
[535] John Tolan, 'A French Paradox?: Islam and Laïcité' (2017) 18(2) Georgetown Journal of International Affairs 41.
[536] Ibid.
[537] Patrick Weil, 'Why the French Laïcité is Liberal' (2009) 30(6) Cardozo Law Review 2704.

servants in their official capacities, not to the wider public in the public space, arguing that it is an erroneous belief amongst academics that religious neutrality in the public sphere is imposed upon individuals.[538] On the ban in 2004 of religious symbols in schools, he claims that the popular belief that the banning of the veil was to prevent the subjugation of women by men, is erroneous since "banning headscarves on that basis would have been an intrusive interpretation of a religious symbol which can have different meanings," not to mention a violation of "the principle of liberal neutrality to prescribe people's inner convictions".[539] He argues instead that the ban was to prevent pressure on Muslim girls who did not want to wear the veil, to safeguard their freedom of conscience, and to ensure public order as there were reported instances of insults and violence against the Muslim girls who did not conform.[540]

Weil's argument must be considered in light of the 2010 law which prohibited the wearing of the full-face veil in public, and has been attacked by a number of commentators for targeting women's "inner convictions". As Vachuez observes, "the legal principle of *laïcité* has increasingly been interpreted as generating obligations of religious neutrality for *individuals* and, whereas it once encompassed religious freedom, it now increasingly serves as a legal ground for curtailing it".[541] To situate this argument with recent legal developments, the *Conseil d'État* in France has recently ruled that burkinis are not allowed in public swimming pools in Grenoble, stating, "The new rules of procedure for the municipal swimming pools of

[538] Patrick Weil, 'Why the French Laïcité is Liberal' (2009) 30(6) Cardozo Law Review 2705.
[539] Ibid 2706.
[540] Ibid 2707.
[541] Stéphanie H Vauchez, 'Is French *Laïcité* Still Liberal? The Republican Project under Pressure (2004–15)' (2017) 17 Human Rights Law Review 287.

Grenoble affect… the proper functioning of the public service, and undermines the equal treatment of users, so that the neutrality of public service is compromised".[542]

Addressing the new developments post-2004, Vauchez describes the current state of the law as a "*new laïcité* so as to underline the actual subversion of the original meaning of the principle," arguing that the *new laïcité* has a discriminatory impact.[543] Hunter-Henin is of a similar opinion, and argues that the 2010 ban exceeds the boundaries of the notion of *laïcité*. She asserts that "even the most virulent forms of *laïcité* cannot stretch beyond public services or public agents and be applied to places and people who in no way emanate from the state. If they did, *laïcité* would no longer be a mode of Church/State relationship which leaves room for the manifestation of individual beliefs but would become a vehicle for State indoctrination".[544] Hunter-Henin's argument only makes sense, however, if her initial premise is accepted viz. that the protection of *laïcité* requires only public servants to refrain from displaying religious allegiance. However, this starting assumption is by no means uncontroversial. It might be argued that permitting any one religious group to become an intrusive presence in the public square is an endangerment of *laïcité*.

Obviously, what constitutes as 'intrusive' presence is highly subjective. However, other European regimes in the 20th and 21st centuries have interpreted their version of secularism as demanding that even private, non-state actors moderate religious expressions visible and

[542] Sky News, 'Burkinis not allowed in public swimming pools in French city, top court rules' (21 June 2022) https://news.sky.com/story/burkinis-not-allowed-in-public-swimming-pools-in-french-city-top-court-rules-12638160?dcmp=snt-sf-twitter accessed 6 July 2022.
[543] Stéphanie H Vauchez, 'Is French *Laïcité* Still Liberal? The Republican Project under Pressure (2004–15)' (2017) 17 Human Rights Law Review 287.
[544] Myriam Hunter-Henin, 'Why the French don't like the Burqa: *Laïcité*, National identity and Religious Freedom' (2012) 61 International and Comparative Law Quarterly 639.

audible to others in light of their impact on the common environment. For example, the left-wing idealistic Second Spanish Republic prohibited religious processions and even the ringing of church-bells in some circumstances.[545] There is of course a discussion to be had as to whether such measures were justifiable or tactically wise (arguably they alienated some religious citizens who might otherwise have been far more sympathetic to the otherwise socially progressive policies of the government).[546] It is not the purpose of this thesis to judge whether the French mode of multiculturalism is desirable, intellectually coherent, or even invariably ECHR compliant. Rather it is to understand its operation on its own terms, and therefore the practical impact of the Medium as it relates to FGM. The bottom line is that at present, the French political mechanisms have favoured an understanding of *laïcité* which restrains some expressions of faith in public which are perceived to undermine republican values.[547] This might be deemed problematic by commentators, but it is the mode of *laïcité* currently in place, and we must therefore engage with this reality.

[545] Javier García Oliva and Helen Hall, *Constitutional Culture, Independence and Rights: Insights from Quebec, Scotland, and Catalonia* (University of Toronto Press 2023) 103.
[546] Ibid.
[547] *S.A.S. v France* [GC], no. 43835/11.

5.6 Section Two – France's Response to FGM

It was necessary to provide a background on French republicanism, and particularly French Republican ideology, in order to understand how France responds to cultural diversity; and more specific to the purposes of this thesis, how France responds to FGM – a by-product of cultural diversity. Before delving into the response, it is important to note that FGM is a private affair – conducted in secret – unlike many other manifestations of cultural diversity, which occur in the public sphere as seen in the foregoing section. Certainly, arguments rooted in what is permitted in the public sphere (whether from representatives of the state, or in terms of the overall cultural environment) are not of direct relevance.

Although France does not recognise and indeed accommodate group rights, there are some demands by minority groups that exceed even the confines of toleration, as they challenge the very tenets of a liberal society. In most liberal states, the practice of FGM is regarded as contravening the principle of equality among men and women. While FGM is practised for different reasons by different communities, the WHO asserts that the root cause for its perpetration and continuity across all practising communities is gender inequality and oppression.[548] Even without reference to France's antipathy towards cultural difference, FGM could never be tolerated within its borders as it contravenes one of the core republican principles – the principle of *égalité*.

[548] WHO, Eliminating Female Genital Mutilation: An Interagency Statement (2008) 5.

5.7 The Excision Trials

FGM became illegal in France in 1983 after the *Cour de Cassation* (Court of Final Appeal) passed a judgment stating, "*L'ablation du clitoris constitue un crime de violence ayant entraîné une mutilation au sens de l'article 312-3 du Code de procédure pénale*" (The removal of the clitoris constitutes a crime of violence resulting in mutilation as defined by article 312-3 of the Penal Code).[549] Interestingly, the case which led to judgement in question had nothing to do with custom or culture. It involved a white French woman, Daniele Richer, who had cut off her daughter's clitoris.[550] The *partie civiles*[551] in migrant cases argued that the Richer case constituted a precedent to be applied in excision cases involving Africans, since excision was excision regardless of the motivation. Further to this, discrimination between the different types of excisions would leave African girls unprotected.[552] The judgment, therefore, was also "intended to serve as jurisprudence for future cases of excision performed within migrant communities".[553] Prior to the 1983 judgement, the first excision trial had actually taken place in 1979. In June 1978, Doua, a three-year-old girl had died after an excision. At the time, excision was not considered a criminal offence so the case was tried in a *Tribunal*

[549] Isabelle Gillette-Frenoy, *L'excision et sa presence en France* (Editions GAMS 1992) 32-33. Note that the *Code Pénal* has been amended over the years and, currently, the relevant provisions on mutilation are arts 222-9, 222-10, 222-16-2 and 113-7.

[550] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour, and R A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 62.

[551] Under French law any individual or organization can associate themselves with the public prosecutor in criminal cases by declaring themselves *partie civile*. A separate lawyer represents the *partie civile* and has the right to present arguments in court.

[552] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour, and R A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 62.

[553] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) Signs Feminism and the Law 944.

Correctionnele (police court), the *exciseuse* (exciser) received a one-year suspended sentence and the parents were not tried.[554]

In 1982, the story of Bobo Traoré made headlines. Bobo, a three-month-old girl, had died two days after an excision. The autopsy had revealed there was no blood left in her body. Her father, who did not take her to hospital despite the obvious complications, feared what they had done was illegal in France.[555] Bobo's case caused outrage and feminist lawyer, Linda Weil-Curiel,[556] working in conjunction with organizations such as the *Commission Pour L'abolition des Mutilations Sexuelles* (CAMS) lobbied for cases of excision to be tried before the *Cour d'Assises*/Assize court (criminal court) under article 312-3 of the *Code Pénal*. Bobo's parents had been brought before a police court and charged with "failure to render assistance to a person in danger".[557] CAMS (represented by Linda Weil-Curiel), SOS *Femmes Alternatives* and *Enfance et Partage* joined the proceedings as *partie civilles* and after a long and complex court process, the *Tribunal Correctionnele* declared itself incompetent to hear the case and sent it to the Assize court.[558] The parents appealed and the case was heard by the *Cour d'Appel* (Court of Appeal) of Amiens which ordered them to serve a one-year suspended sentence.[559]

[554] Ibid.
[555] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour, and R A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 62.
[556] Linda Weil-Curiel is a French lawyer and campaigner against FGM. She appeared on behalf of *Commission pour l'abolition des mutilations sexuelles* (CAMS) as *partie civile* in the trials discussed herein.
[557] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) Signs Feminism and the Law 944.
[558] Ibid.
[559] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 109.

In the same year (1982), the *Tribunal Correctionnele* tried the father of another little girl, Bintou Doucara, who in 1980 was admitted to hospital with severe haemorrhaging from an excision; once again the defendant received a one-year suspended sentence for "voluntary assault of a child of under fifteen years of age".[560]

The first case to be tried in a criminal court was in 1988 involving the parents of Mantessa Baraji, a five-week-old baby, who died in 1983 from acute anaemia caused by haemorrhaging six weeks after an excision.[561] They were charged with "voluntary assault on a child of under fifteen years of age, having led to unintentional death".[562] The prosecutor asked for five years imprisonment with one-year served and three suspended, explaining that "a sufficiently significant punishment" was needed to affirm that excision in France was a criminal offence.[563] He nonetheless acknowledged that prison sentences or indeed the threat of prison, was not enough in deterring the practice, alluding to the fact that it would take dialogue and engagement with practising communities to change deeply held beliefs concerning the practice. The parents received a three-year suspended sentence, in the first verdict rendered by a jury in an excision trial.[564]

[560] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) Signs Feminism and the Law 944.
[561] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 102.
[562] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) *Signs* Feminism and the Law 945.
[563] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 102
[564] Ibid.

The second criminal court case was heard in 1989, the child, Assa Traoré, survived the excision. Her mother alone was charged as her father was at work when the procedure was done.[565] The PMI doctors who gave evidence during the trial stated that the mother was informed after her daughter's birth and during subsequent post-natal visits that excision was illegal in France.[566] She received a three-year suspended sentence.

In 1990, the Soumaré case was heard – the first case involving a mixed marriage between a French mother and an African father. The mother pressed charges against the father, Saloum Soumaré, who had secretly arranged for an excision on their one-year old daughter, Kadidia, however, she later withdrew the charges fearing violent retaliations from the father.[567] The magistrate ruled that there was no case against the father since he did not perform the operation, thus he could only appear as a witness not as a defendant.[568] The *parties civiles* appealed the ruling and the father received a five-year suspended sentence.[569]

In 1991, two cases involving the same exciser were tried which caused a huge media stir. Winter identified the reasons for the media attention as follows: "firstly, the role of the *exciseuse* came into closer scrutiny (previously most cases were brought against the parents, and this was in any case the first trial of *exciseuse* an in a criminal court); secondly, the sentences were heavier; and lastly, the case became more of a political polemic than a legal trial".[570] The trials generated considerable public debate around the issue of excision. Maurice

[565] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) *Signs* Feminism and the Law 945.
[566] Ibid.
[567] Ibid.
[568] Ibid 945-6.
[569] Ibid 946.
[570] Ibid.

Peyrot of *Le Monde* who wrote a detailed report of the cases, commented on the issue of public interest/opinion. Referring to the Baraji case in 1988, he wrote that the presiding judge had seen it fit, "to warn the court at the opening of proceedings that as always in an Assize court case it was individuals, and not ideas, that were on trial".[571] He observed that the warning was in vain as the proceedings in Baraji did not focus on the defendant's behaviour but the rite of excision itself, as did the Assa Traoré trial, as well as the present cases which, in his words, "did not resemble a normal criminal trial".[572]

Before delving into the first case, of note is that the genesis of the case was actually in 1984, when "a doctor working for a family welfare association" reported the couple for excision.[573] They were charged in 1985 with "the minor offence of aiding and abetting voluntary assault on a child under 15".[574] The case was brought before a *Tribunal Correctionnele* and Linda Weil-Curiel argued that the medical profession recognised excision as a voluntary mutilation thus it was the *Cour d'Assises* that had jurisdiction to hear the matter.[575] The *Tribunal Correctionnele* ruled that it did not have jurisdiction to hear the case basing its decision on the 1983 judgment by the *Cour de Cassation* aforementioned (the Richer case), but the public prosecutor appealed.[576] In 1987, a court of appeal upheld the ruling by the *Tribunal Correctionnele* despite the public prosecutor arguing that it was not appropriate for the case to be brought before an assize court since "it was a matter of ritual excision practiced at the

[571] Maurice Peyrot, 'The Prosecution of Aramata Keita, Sory Coulibaly, and Sémité Coulibaly' (Passages, 24 March 1991) https://quod.lib.umich.edu/p/passages/4761530.0003.002/--prosecution-of-aramata-keita-sory-coulibaly-and-semite?rgn=main;view=fulltext accessed 11 July 2022.
[572] Ibid.
[573] Ibid.
[574] Ibid.
[575] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 98.
[576] Ibid.

request of the Malian parents, who are subject to the imprint of their ancestral culture".[577] The case was then later heard at the Paris assize court in March 1991, where the *exciseuse,* Aramata Keita, was charged with voluntary assault resulting in the mutilation of a child under fifteen years of age.[578] The prosecution alleged that she excised six young girls from 1982-1983, receiving a *pagne*, soap and 100 francs as payment.[579] The parents of the minors, Sory Coulibaly and Sémité Diarra, were charged with abetting the crime.[580] The prosecutor, Commaret, whilst admitting that the issue of culture and tradition was an undeniable aspect of the case, reminded the jury that they were not "ethnologists" or "impassive observers", but "judges entrusted with the responsibility of deciding what was acceptable and what was not".[581] She stated the following in her summation: -

> Now, let us state it plainly, excision is unacceptable on ethical, hygienic, and legal grounds. Who among you could consider that respect for difference infers passivity, itself the source of wounds and degradation? Who would not understand that to condone such practices is to condemn many African children born and living in France—because they are black—to not benefit at all from French law? In ratifying the international convention on the rights of children, did we not promise to protect all children living on our soil, without discrimination, to protect them from physical or moral violence, even if exercised at the initiative of their own parents? Are we not

[577] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 111.
[578] Maurice Peyrot, 'The Prosecution of Aramata Keita, Sory Coulibaly, and Sémité Coulibaly' (Passages, 24 March 1991) https://quod.lib.umich.edu/p/passages/4761530.0003.002/--prosecution-of-aramata-keita-sory-coulibaly-and-semite?rgn=main;view=fulltext accessed 11 July 2022.
[579] Ibid.
[580] Ibid.
[581] Ann Arbor, 'The summation of Prosecutor Commaret' (Passages, 1992) https://quod.lib.umich.edu/p/passages/4761530.0003.004/--summation-of-prosecutor-commaret?rgn=main;view=fulltext accessed 11 July 2022.

committed to consider their "higher interest"? To acquit would be to admit the unacceptable in the name of exoticism.[582]

Commaret called for a severe punishment for the exciser, whom she argued was driven by "financial interests than with the beliefs of her tribe" and demanded five years imprisonment.[583] Keita was sentenced to five years in prison. Regarding the parents' punishment, the prosecutor was more lenient noting that it would not be "appropriate to deprive fourteen children of their parents" and instead called for a sentence that would support their acculturation.[584] This was in contrast to Linda Weil-Curiel, who stressed the responsibility of the parents, demanding "a certain degree of severity" in their sentencing.[585] Commaret, however, suggested a different sort of sentencing: "Has the moment not come to make some progress by looking at the wide range of sentencing options for a clearer and more watchful punishment that condemns while reinstating, that prohibits and reintegrates, that broadens the verdict with a sensitivity to cultural differences?"[586] She argued that a suspended prison sentence without an "accompanying mechanism for oversight was but a slap on the wrist, a placebo not a cure".[587] She conceded that the type of sentence she was suggesting was not strictly speaking available within the law, thus urging the jury to prescribe a three-year suspended prison term with probation, proposing that the sentencing judge

[582] Ann Arbor, 'The summation of Prosecutor Commaret' (Passages, 1992) https://quod.lib.umich.edu/p/passages/4761530.0003.004/--summation-of-prosecutor-commaret?rgn=main;view=fulltext accessed 11 July 2022.
[583] Ibid.
[584] Ibid.
[585] Maurice Peyrot, 'The Prosecution of Aramata Keita, Sory Coulibaly, and Sémité Coulibaly, (Passages, 24 March 1991) https://quod.lib.umich.edu/p/passages/4761530.0003.002/--prosecution-of-aramata-keita-sory-coulibaly-and-semite?rgn=main;view=fulltext accessed 11 July 2022.
[586] Ann Arbor, 'The summation of Prosecutor Commaret' (Passages, 1992) https://quod.lib.umich.edu/p/passages/4761530.0003.004/--summation-of-prosecutor-commaret?rgn=main;view=fulltext accessed 11 July 2022.
[587] Ibid.

would, "pursuant to article R.58-3 of the Penal Code of Procedure", "enjoin the Coulibalys to submit to educational instruction and mobilize around them the welfare and support of organizations necessary to establish dialogue and further mutual understanding".[588] The parents were sentenced to a five-year suspended prison term and two years' probation, which was above what Commaret had asked for.[589]

The second case was heard in Bobigny in June 1991. Keita was accused of excising 16 children of 10 Senegalese and Malian couples, one of whom died after the excision.[590] Surprisingly (given the fact that one child died and the longer sentence in the Coulibaly case), in this case the *exciseuse* received a four-year sentence – three to be served and one suspended.[591] As for the parents, three were acquitted and the rest received a one-year suspended sentence each.[592] Winter suggests a few reasons that might explain the backtracking in the severity of the sentences: the Bobigny trial was (by law) closed and held in a juvenile court since one of the defendants had been a minor at the time the excision was performed, hence the trial lacked the sort of media attention that dominated the Paris trial; the *exciseuse* admitted having performed the excisions unlike in Paris where she denied it; she also had the benefit of a Senegalese lawyer who spoke her language, whereas in Paris only the charges and direct questions put to her were interpreted (as is required by law); and the white French experts

[588] Ann Arbor, 'The summation of Prosecutor Commaret' (Passages, 1992) https://quod.lib.umich.edu/p/passages/4761530.0003.004/--summation-of-prosecutor-commaret?rgn=main;view=fulltext accessed 11 July 2022.
[589] Maurice Peyrot, 'The Prosecution of Aramata Keita, Sory Coulibaly, and Sémité Coulibaly, (Passages, 24 March 1991) https://quod.lib.umich.edu/p/passages/4761530.0003.002/--prosecution-of-aramata-keita-sory-coulibaly-and-semite?rgn=main;view=fulltext accessed 11 July 2022.
[590] Raymond Verdier, 'The *Exciseuse* in criminal court: the trial of Soko Aramata Keita' (Passages, June 1991) https://quod.lib.umich.edu/p/passages/4761530.0003.003/--hi1-rendiexciseusehi1-in-criminal-court-the-trial-of-soko?rgn=main;view=fulltext accessed 11 July 2022.
[591] Ibid.
[592] Ibid.

who testified had "closer dealings with the migrant communities concerned than those who testified in the Paris trial".[593]

While there have been other cases since and they will be mentioned briefly below, the publicity of the 1991 trials brought an obscure and secretive practice into public scrutiny, and the government and the medical profession had to face up to the fact that excisions were being carried out in great numbers in France.[594] As Winter avers, there was "greater pressure on medical and social workers to report cases of excision; what had previously been perceived by many as being at the discretion of the professional personnel concerned, is now seen as a professional – and indeed, legal obligation".[595] As noted in chapter three, medical and social workers and other professionals usually bound by confidentiality, are exempted from the professional secrecy laws so long as a report is made in good faith.[596]

According to Winter, there was discontent with the trend of suspended sentences, with growing demand to require at least some duration of the prison sentence to be served.[597] There is certainly a common theme of suspended sentences, and whereas some have prescribed time to be served, it is evidently not the norm, therefore it is difficult to predict if a case will be given a to-be-served sentence. The cases following the 1991 trials are an illustration of this.

[593] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19 (4) *Signs* Feminism and the Law 946.
[594] Ibid 947.
[595] Ibid.
[596] *Code Pénal* art 226-14.
[597] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19 (4) *Signs* Feminism and the Law 947.

In January 1993, Fofana Teneng was charged with "being an accomplice to intentional acts of violence or *voies de fait* on a child aged less than 15 years that have caused mutilation".[598] She was accused of arranging the excisions of her two daughters aged one and two-years-old in 1987, asking a third person to come to her house to perform the excisions.[599] The prosecutor asked for a four-year sentence with some time served in prison so that the accused would "feel the full weight of the punishment (*'le coup de baton tombe'*)".[600] Teneng received a four-year suspended sentence with one year to be served in prison, the first time a mother had not received a fully suspended sentence.[601] Around the same time in Bobigny, Coumba Gréou, the mother of a one-month-old baby, received a suspended prison sentence despite it being the first time that infibulation was also alleged – the judge, however, was not convinced of the charge of infibulation and dismissed it.[602]

Another case followed in February 1993, involving two mothers, Taky Soucko-Traoré and Oura Yattabare-Doucouré, charged with "being accomplices to personal injuries on a child aged less than 15 years that have caused mutilation"; their daughters had been subjected to excision.[603] Their husbands who had been at work at the time the excisions were performed were not charged.[604] In contrast to the Coulibaly case, the prosecutor, Jean-Claude Thin, was less lenient with the mothers, asking for a five-year sentence with at least part of the sentence served in

[598] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 117.
[599] Ibid.
[600] Ibid 119.
[601] Ibid.
[602] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) Signs Feminism and the Law 947.
[603] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 104.
[604] Ibid 105.

prison.[605] Unlike Commaret who felt that educating the parents would be a better deterrent than jail time, Thin argued that "education and punishment were in fact complementary and not to apply existing penal norms would be anti-educational"; he argued that that "the debates over culture have nothing to do with excision … what counts is the protection of the child" and that "not enforcing the law would mean considering Malian people unequal to French before the law".[606] Nevertheless, Traoré and Doucouré received a five-year suspended sentence.

Similarly, in the *Ba* case of 1996, the prosecutor decried the suspended sentences. The case involved Hadidja Ba-Maréga whose five daughters had been subjected to excision.[607] The prosecutor argued that excision was "a form of violence against children" and that "the notion of bodily integrity is universal".[608] It was his opinion that prevention was not enough and that suppression through punishment was needed. He therefore asked the court for a "punitive sentence that would serve as an example: a five-year sentence with at least one year to be served in prison".[609] Ba was given a three-year sentence, two years suspended and one to be served in prison.

In 1997, the Aïdara case was heard before the *Courd'Assises* of Bobigny in which Aïdara and his wife, Badiaga, were charged as "accomplices to intentional acts of violence that have

[605] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 105.
[606] Ibid.
[607] Tanguy Berthemet, '*Excision: l'accusé voulait respecter ses coutumes' Le Figaro* (Paris 24 Octobre 1996); Tanguy Berthemet, '*Devant la cour d'assises de la Seine-Saint-Denis, le procureur avait requis cinq ans de prison avec sursis' Le Figaro* (Paris, 25 Octobre 1996)
[608] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 105.
[609] Ibid.

caused mutilation on a child aged less than 15 years".[610] Their two daughters had been subjected to excision and partially infibulated. The husband, who initially said he had given his consent for the excision, later retracted this statement claiming that he was away in Senegal when both operations were performed.[611] The wife admitted to organising the excisions and receiving money from her husband to pay for them, she received a five-year suspended sentence and the husband received four years suspended with one year to be served in prison.[612] This was the first time a father was ordered to serve time in prison for an excision, and for that matter, the first time a harsher sentence was prescribed on a father instead of the mother.

The Gréou case of 1999 is arguably more infamous than the 1991 Keita trials. Hawa Gréou was arraigned before the *Cour d'Assises* of Paris, along with 27 parents, for breach of "*les articles 312-3 et 222-10 du Code pénal qui punissent sévèrement les auteurs de maltraitance sur les enfants*" (the articles 312-3 and 222-10 of the Penal Code which severely punish the authors of child abuse).[613] She was accused of committing 48 excisions and had previously been convicted of another excision in 1994 and ordered to serve a one-year suspended sentence.[614] The complaint was made by one of the victims, Mariatou Koita, who underwent the excision at the age of eight, her mother was one of the defendants.[615] Gréou reportedly told police: "I do it the way my mother and my grandmother did it. I cut the clitoris, I take clean earth and I

[610] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 119.
[611] Ibid.
[612] Ibid 120.
[613] Fanny Chapoton, '*La loi contre l'excision, coutume africaine' L'événement* (Paris, 2 Février 1999).
[614] Emilie Lanez, '*Excision celle qui a rompu le silence' Le Point* (Paris, 6 Février 1999); Stéphane Joanny*, 'Maman Gréou l'exciseus jugée aux assises' Le Parisien* (Paris, 2 Février 1999).
[615] Ibid. See also, Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 96.

mould it into a charm that I place on the child's sex".[616] Gréou was sentenced to eight years imprisonment and ordered to pay damages (with interest) to the 48 girls.[617] The complainant's mother was sentenced to two years in prison, and of the remaining 25 parents, three were ordered to serve a three-year suspended sentence and 22 were ordered to serve a five-year suspended sentence.[618]

Of the cases discussed, it is noteworthy that only two have involved prosecuting the exciser. Whilst this is lamentable, it is unsurprising since excisers are difficult to track down as the parents who hire their services typically protect their identity. In many practicing communities, they are held in high esteem as guardians of the custom, since circumcision as a rite of passage or even as a religious rite, is deeply entrenched in the customs of the community. The rehabilitation and education of the excisers is therefore necessary for prevention. It is telling that before the 1999 trial, Gréou had already been convicted of excision once before, yet she continued performing the operations. She is quoted in the trial as saying, "I am sorry if I caused any harm. It is a custom, I did not do it maliciously. Now I understand – now we must stop".[619] Whether her remorse was genuine, and she understood that the practice is harmful and wrong, one cannot say. In fact, Dilday, who comments on Linda Weil-Curiel's book *Exciseuse*[620] states, "Gréou never really agreed that genital mutilation was morally wrong, but she did accept that it was against the law of the country she chose. Since

[616] BBC News, 'World: Europe Woman jailed for 48 circumcisions' (17 February 1999) http://news.bbc.co.uk/1/hi/world/europe/281026.stm accessed 12 July 2022.
[617] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 107.
[618] Ibid 108.
[619] BBC News, 'World: Europe Woman jailed for 48 circumcisions' (17 February 1999) http://news.bbc.co.uk/1/hi/world/europe/281026.stm accessed 12 July 2022.
[620] Linda Weil-Curiel who appeared as *partie civile* in Gréou's trial, later interviewed Gréou and her story was published in her book *Exciseuse*: Natacha Henry and Linda Weil-Curiel, *Exciseuse: Entretien avec Hawa Gréou* (Paris 2007) https://www.amazon.co.uk/Exciseuse-Entretien-avec-Hawa-Gr%C3%A9ou/dp/2352880475.

then she has spoken out, exhorting her community to cease the practice and obey French law".[621]

The foregoing pages have delineated a number of excision cases spanning from 1979 to 1999. A vast majority of excision trials in France occurred in the 1980s and 1990s, however, there have been cases post-millennium. The most recent case was in April 2022, involving a 39-year-old mother whose three daughters underwent excision during holidays in Djibouti between 2007 and 2013, she received a five-year suspended sentence.[622] The cases discussed herein are certainly not exhaustive as it is reported that France has prosecuted over 35 cases of FGM.[623]

5.8 Suspended Sentences and the Issue of Culture

Remarking on the dissatisfaction with the suspended sentences, and particularly the time-to-be-served order which differs slightly from case to case, Winter suggests that the "personality and personal opinions of the presiding judge has enormous bearing on the outcome of a trial".[624] One might be tempted to consider this as, at least partially, true given the varying sentences. It is difficult to comment on a subjective statement, however, it is useful to note

[621] K A Dilday, 'A girl, a knife, and Hawa Gréou' (Open Democracy, 30 May 2007) https://www.opendemocracy.net/en/a_girl_a_knife_and_hawa_greoujsp/ accessed 13 July 2022.
[622] Assiya Hamza, 'Female genital mutilation: 'Women circumcise little girls for men' (France 24, 6 February 2023) https://www.france24.com/en/europe/20230206-female-genital-mutilation-women-circumcise-little-girls-for-men accessed 8 March 2023.
[623] Els Leye et al, 'An analysis of the implementation of laws with regard to female genital mutilation in Europe' (2007) 47 Crime Law Soc Change 16.
[624] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) *Signs* Feminism and the Law 947.

that in an inquisitorial legal system such as in France, the presiding judge has greater control over the proceedings. This does not mean, however, that the system allows for a judge to influence the outcome of a trial. The following are some of the ways French criminal procedure differs from the English: the presiding judge subjects an accused to an interrogatory (*l'interrogatoire*) during the trial and has the power to question and interrogate witnesses; the prosecutor must first ask the presiding judge for leave to speak before directly putting questions to the accused or a witness; and the accused (or his counsel) cannot question the witnesses directly but only through the presiding judge who acts as an intermediary.[625]

Despite the greater control of a presiding judge in a trial, the question of their personal influence is arguable. Although one can somewhat concede that some elements of a judge's personal opinion might penetrate, particularly in sentencing, – after all the judges who try these cases are human beings – the principle of impartiality is firmly held in most jurisdictions and there are mechanisms in place to ensure it is safeguarded. And while the French legal system is inquisitorial, it is also a civil law system that relies primarily on the written law/codified law. Thus unlike in English Common law, a French judge does not rely on precedent (or bound by the doctrine of stare decisis) but the "scientific interpretation of the law" as developed by eminent jurists.[626] An assize court judge is therefore not bound by the decision of a previous case with similar facts which might explain, or at least justify, the variations in sentencing in the excision trials. This is not to say, however, that there is no uniformity whatsoever with the judgments, as evidently there is, particularly with regards to

[625] *Code d'instruction criminelle* (Code of Criminal Procedure) arts 442, 442-1; James W Garner, 'Criminal Procedure in France' (1916) 25(4) Yale Law Journal 262. See also, E Aguilera, 'The French Legal System' Ministry of Justice, November 2012).
[626] Irene Bessette, 'French Civil Law System Since 1804' (1980) 73(2) Law Library Journal 348.

the issuing of suspended sentences. As Ancel observes, "case law results, therefore, in France, not from an obligatory leading case, but from a whole series of decisions which have followed a particular interpretation of the law".[627] Furthermore, it is appropriate to observe that the detail of the factual context will be different in every case, rendering some variation in sentences appropriate, just as is the case for all other offences, from assault in a bar to corporate fraud.

These trials do raise important issues and illuminate, at least legally, how the French respond to FGM. The suspended sentences are certainly a key feature and even the opinions of prosecutors differed on the severity of punishment for the parents. The issue of culture was at loggerheads with the law and the defendants relied heavily on it as a defence. Winter observes that the expert witnesses relied heavily on "the idea of a 'group superego' that controls the actions of the members of the group".[628] It is difficult for the French legal system to respond to the claim of cultural difference, not least because courts must rely on fact and law and plainly speaking, mutilation is a crime under French law, but also because of the republican principle of universalism and the strict requirement for assimilation.

Nonetheless, the influence of cultural relativism, manifesting as defences of 'their culture' cannot be denied in these trials. The prosecutor in the Coulibaly trial when an objection was raised regarding jurisdiction, opposed the application to have the case heard in a criminal court stating that it was "inopportune" since the defendants "had been influenced by their

[627] Marc Ancel, 'Case Law in France' (1934) 16(1) Journal of Comparative Legislation and International Law 17.
[628] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) Signs Feminism and the Law 949.

ancestral traditions".[629] The prosecutor in the Keita trial, fervently sought a severe sentence for the exciser and was more lenient with the parents, yet the relationship between the exciser and the parents is a symbiotic one, in fact it is the parent who seeks out the services of the exciser.

In Europe, FGM is considered no different than any other form of child abuse and in France all children enjoy the same rights including the right to be protected against child abuse.[630] While objectively speaking, subjecting a child to mutilation is indeed child abuse, the complexities surrounding FGM cannot be ignored. In contrast with many other cases of abuse or neglect, there is no intention to harm. In fact, the mothers (who themselves have been cut) believe it is necessary (culturally and/or religiously) and to secure their daughters' 'womanhood' and 'marital futures'.[631] Hibo Wardere, an FGM survivor and author of "Cut: One Woman's Fight Against FGM" explained this complexity to a Home Affairs Committee during roundtable discussion on FGM in 2016: -

> You have to understand that the parents who are committing these crimes—FGM is a crime; I agree with that. But you have to understand that in the communities we come from, we do not see this as child abuse. These parents are loving parents. They think that what they did is a loving thing because that is what was done to them and that is the mentality they have.[632]

[629] Maurice Peyrot, 'The Prosecution of Aramata Keita, Sory Coulibaly, and Sémité Coulibaly (Passages, 24 March 1991) https://quod.lib.umich.edu/p/passages/4761530.0003.002/--prosecution-of-aramata-keita-sory-coulibaly-and-semite?rgn=main;view=fulltext accessed 11 July 2022.
[630] Els Leye and Alexia Sabbe, Overview of Legislation in the European Union to address Female Genital Mutilation: Challenges and Recommendations for the Implementation of Laws (United Nations, May 2009).
[631] See justifications for FGM in Chapter Two 2.7.
[632] Home Affairs Committee, *Roundtable Discussion on Female Genital Mutilation* (HC 2016) Q41.

Hélène Liehnard, technical adviser to the Department of Population and Migration in the Interior Ministry, who was called as a witness for the prosecution in the Keita trial stated: "No evil intent should be read into excision. They do it because they love their children. Parents think they're doing the right thing". She suggested that what was needed was "a process of explanation, dialogue and persuasion".[633] Another prosecution witness in the trial, Claude Meillassoux, an ethnologist at the French National Scientific Research Centre, said: "We must be quite clear about this. The deplorable rite of excision is not a form of ill-treatment. There is no desire to hurt".[634] It is necessary to highlight that these two witnesses appeared for the prosecution, i.e. the Republic. The lack of intent to harm, in which underlying is the issue of culture, may therefore explain the courts' tendency to prescribe suspended sentences. It must be noted that such arguments are dramatically weakened where parents have failed to seek timely medical care when it has been obvious that the child was bleeding dangerously or otherwise in obvious need of treatment. This neglectful behaviour, motivated by a fear of legal consequences, springs from self-interest rather than parental love. The decision to choose FGM and the failure to provide medical attention in a crisis are two distinct elements of behaviour, and the latter will not always be present.

Whilst there is clearly aspects of cultural relativity in the trials, the weight of the French republican model is evident in the way France chose to respond to the need to sanction FGM. Rather than enact a specific legislation prohibiting FGM, the practice was sanctioned in

[633] Maurice Peyrot, 'The Prosecution of Aramata Keita, Sory Coulibaly, and Sémité Coulibaly (Passages, 24 March 1991) https://quod.lib.umich.edu/p/passages/4761530.0003.002/--prosecution-of-aramata-keita-sory-coulibaly-and-semite?rgn=main;view=fulltext accessed 11 July 2022.
[634] Ibid.

accordance with existing provisions of the Penal Code. This decision, Bellucci asserts, reflected the "French model of immigrants' social inclusion known as the *modèle français d'intégration*" in which immigrants are viewed as individuals rather than members of an ethnic minority group; thereby the French legal system cannot provide for rules "specifically aimed at protecting ethnic minority groups".[635] NGOs working for the elimination of excision in France, welcomed the decision. In their opinion, making an exception to the integration model only with regard to excision, would lead to accusations of racism as well as stigmatise the concerned communities, which would also undermine their work.[636] Judge Corneloup who was a critic of the decision, said that "he would have preferred that the courts use ad hoc provisions clearly stating that excision in France is prohibited, rather than rules designed to sanction behaviours that intend to harm the child".[637] Bellucci also notes that opinions "among legal professionals (lawyers and judges in particular) were divided", following the decision to have excision cases tried in the criminal court, but most of the criticism came from academics and they generally centered on the need to evaluate the cases from a cultural relativist point of view.[638]

While the legal system is a necessary part of the effort to prevent and prosecute FGM, the law is only a small facet of the fight. In fact, some medical professionals are opposed to prosecution. In their opinion, penalties have no lasting effect except to induce parents to postpone FGM and have it done outside the country. A nurse stated, "The judiciary is VERY FAR from African families who live in France, and the essential work is to be carried out in the

[635] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 100.
[636] Ibid.
[637] Ibid.
[638] Ibid.

first instance. This work does not consist in frightening them, but in making them understand the harm done to a little girl when she is circumcised…".[639] Aside from criminal enforcement, the *Conseil Général,* particularly the department responsible for child protection, provides another mode of regulation. France requires every pregnant woman to declare her state, "that declaration, followed by the medical birth certificate, is sent to the PMI departmental service, and as a result of the medical preventive controls during the first six years of the child's life, it is possible to identify the girls exposed to FGM and to incorporate this issue into the health education programs".[640] Additionally, the medical profession has also developed protocols and guidelines to address incidences of FGM.[641] On the governmental front, FGM is included among France's sustainable development goals for (2018-2022) in its international strategy on gender equality.[642] The government also funds public awareness campaigns, such as the TV series "*C'est-la-Vie*", co-funded by France since 2012 and distributed through 44 national African channels.[643]

Having examined French republicanism and France's response to FGM, the question arises: has the French republican model positively impacted FGM response? Guiné and Fuentes suggest that it has, asserting that France's promotion of common values and its non-recognition of cultural difference "has shown itself quite effective in defending the individual rights of girls and women by reducing their exposure to FGM practices".[644] It is indeed

[639] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 503.
[640] Ibid.
[641] See Chapter Three 3.12 for the protocols.
[642] French Ministry for Europe and Foreign Affairs, France's International Strategy on Gender Equality (2018–2022) (2018).
[643] Permanent Mission of France, 'We must fight against female genital mutilation' (9 June 2020) https://onu.delegfrance.org/We-must-fight-against-female-genital-mutilation-10668 accessed 13 July 2022.
[644] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 503.

conceivable that France's universalism, the insistence on "sameness" in this instance, does translate into a more equitable outcome for African girls at risk. If the goal is to treat a black girl the same way as a white girl, then the issue of cultural difference, which can be a hindrance to preventing and persecuting FGM, is eliminated. Of note too is that the French regard FGM, not as genital mutilation but sexual mutilation, thereby focussing on its intended effect which is to deny a woman's ability to enjoy sex. Linda Weil-Curiel stated, "We call it sexual mutilation, not genital – we know that it's female sexuality that is aimed at".[645] By this approach too, an African woman's sexuality is not considered different or less than a white woman's sexuality. It is this universalistic republican approach that is undoubtedly responsible for France's "success" in comparison to other European nations.

And although it took the immense and persistent effort of individuals such as Linda Weil-Curiel and the NGO's, France deserves commendation for regarding excision as any other criminal offence under the law and consistently prosecuting it as such. That said, the suspended sentences do sit contrary to the claim of universalism. Acknowledging the complexities surrounding FGM already mentioned, a strict application of the republican principle of universalism should theoretically translate to a full prison sentence as would typically be prescribed in a child abuse case. Commenting on the suspended sentences, Dembour suggests, somewhat humorously, that it is "as if the courts cannot condone neither the consequences of an acquittal nor those of an imprisonment".[646] She argues that the

[645] Laura Hutton, 'It's child abuse': FGM lawyer who helped prosecute over 100 people in France welcomes first-ever Irish prosecution' (The Journal, 1 February 2020) https://www.thejournal.ie/fgm-linda-weil-curiel-lawyer-france-ireland-4988286-Feb2020/ accessed 18 July 2022.
[646] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour, and R A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 67.

suspended sentences present a conundrum, "[they] can be seen as reflecting the adoption of a middle-way position between the relativism and the universalism respectively entailed by an acquittal and a firm condemnation . . . however, the adoption of a universalistic position need not necessarily lead to an imprisonment verdict. Conversely, an acquittal does not necessarily mean the adoption of a cultural relativist position".[647]

5.9 Conclusion

Our analysis has shown that the uniquely French approach to multiculturalism, within a staunchly and uncompromising paradigm of republican values of equality and uniformity, has been conducive to a legal response which demands equal protection of the physical integrity and sexuality of all women, regardless of culture or ethnicity. This has encouraged cases of FGM to be prosecuted rigorously. However, the private nature of the practice, meaning that it does not infringe upon the collective environment of *laïcité*, combined with a real-world sensitivity to the fact that some of the parents and practitioners involved in FGM believe that they are acting in the best interests of the victims, might have led the issue to initially be relegated to the background. As we shall discuss in subsequent chapters, this dynamic rendered the importance of the Human Catalyst key.

[647] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour, and R A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 67.

CHAPTER SIX – BRITISH MULTICULTURALISM

6.1 Introduction

As outlined in chapter one, England is the primary focus of this study. However, England is nested within the wider British approach to multiculturalism and it is therefore necessary to begin this section with an examination of this broader context. The first section of this chapter takes the reader through the stages of Britain's multiculturalism, starting from early history (15th century), to slavery, to post-World War II migration, to the commonwealth, to race relations and finally to the multifarious British multicultural model of integration. Having understood how the British respond to diversity, the second section of the chapter examines England's specific response to FGM – a by-product of cultural diversity. The aim of this chapter is to understand British multiculturalism, a key aspect of the English Medium, and how this overarching approach to multiculturalism impacts the nation's response to FGM.

6.2 Section One – Historical development

The forthcoming pages provide a brief overview of the history of diversity in Britain, from the late Middle Ages and a more detailed analysis of the events post-World War II. Migration in the second half of the 20th century onwards eventually led to immigrants from FGM-practising communities settling in Britain.

In the demographic-descriptive usage of the word, Britain is undoubtedly a multicultural state. After World War II in 1945, there was an influx of immigrants into Britain. Some came from Europe – Italians, Poles, and Ukrainians – but most were from colonial territories of the UK, and by the 1980s these immigrants and their descendants made up a significant minority in British society.[648] Although the 1945 post-war migration was substantial in altering Britain's multicultural landscape, linguistic, cultural, ethnic and religious diversity was not a new phenomenon in Britain. Similar to pre-Revolution France, which had five distinctive regions, Britain is also comprised of distinct geographical, cultural and political entities. Scotland, Wales and Northern Ireland are distinct entities with their own devolved governments and have their own unique cultural and linguistic contexts, radically different from England and each other.

As Favell avers, "Britain is not and never has been a monocultural nation-state but is rather a sometimes precarious (and imposed) union of four nations[649] … even if in practice 'English' culture has always had the upper hand".[650] It is not necessary to get into the historical particulars concerning the formation of these four nations, since the pertinent point that Britain is culturally diverse is in itself proven by their existence. That being said, Britain indeed has a diverse multicultural background. Kumar takes issue with scholars who argue that an 'English national identity' already existed by the 8th century, arguing that "'the English' were by no means a unified people, being made up of still diverse groups of Angles, Saxons, Jutes

[648] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 171.
[649] Until the early modern period, Cornwall was also treated as a distinct entity by many observers. In the 20th and 21st centuries, Cornish nationalism has seen a resurgence.
[650] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 102.

and others with distinct ethnicities.[651] More significantly, there was as yet no 'England', but rather, in the territory of south Britain that later came to be called England, a number of competing 'Anglo-Saxon' kingdoms together with significant communities of *Brittones*, the original British inhabitants of much of the island".[652]

Contrary to the common perception that non-Christian religious groups arrived in the 19th century, there is evidence of the presence of religious minorities in early British history. Muslims were present in the 15th and 16th centuries[653], and Jews since the eleventh century, though they were expelled in 1290 and later readmitted by Cromwell in 1656.[654] Jews were tolerated rather than welcomed and faced severe legal obstacles, such as the requirement to swear a Christian (Anglican) oath in order to exercise central rights such as the right to vote and to hold public office.[655] It has been suggested that the response to the large-scale Irish and Jewish migration in the 19th century is significant to understanding Britain's response to diversity.[656] In terms of scale, Irish migration outweighs other groups, yet as Solomos avers, there has been minimal direct intervention by the state to regulate Irish immigration and settlement, particularly in comparison with the state's response to Jewish and black immigration.[657] Solomos explains that this is partly due to the fact that "in 1800 the Act of Union incorporated Ireland into the United Kingdom. Therefore in practice, and then in law, the people of Ireland were incorporated into a larger political unit where they enjoyed

[651] Krishan Kumar, *The Making of English National Identity* (Cambridge University Press 2009) 42.
[652] Krishan Kumar, *The Making of English National Identity* (Cambridge University Press 2009) 42; See also, Javier García Oliva and Helen Hall, *Constitutional Culture, Independence and Rights: Insights from Quebec, Scotland, and Catalonia* (University of Toronto Press 2023) 56-79.
[653] Nabil Matar, *Islam in Britain, 1558–1685* (Cambridge University Press 1998).
[654] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 37.
[655] Sandra Fredman, *Discrimination Law* (Clarendon Press 2002) 76.
[656] John Solomos, *Race and Racism in Britain* (3rd edn, Palgrave Macmillan 2003) 39.
[657] Ibid 38.

citizenship status and could move from place to place in response to economic and political circumstances, within certain constraints imposed by the British state".[658]

Despite the laissez-faire approach to Irish immigration, the local response to Irish immigrants was hostile and there were widespread acts of violence against them; these attitudes stemmed from hostility towards Catholicism as well as anti-Irish prejudice and stereotypes prevalent in British culture, such as their supposed biological inferiority.[659] According to Solomos, the notion of Irish "racial and cultural inferiority" was based "not only on particular ideological constructions of the Irish but also on the definition of Englishness or Anglo-Saxon culture in terms of particular racial and cultural attributes"; he argues that years later, this notion of the "uniqueness and purity" of Englishness was to "prove equally important in political debates on black migration and settlement".[660]

Although by virtue of their skin colour, Jewish and Irish people were indistinguishable from the rest of the white population, they were nonetheless treated as culturally different. And whilst both communities suffered prejudice, politically, there was far more pressure to restrict Jewish migration compared to Irish migration which continued unrestricted.[661] Solomos notes that the political responses to Jewish immigration have often been compared to the post-1945 black immigration, partly because of the "political debates on immigration during these two periods" and because "the Aliens Order of 1905 was a radical departure from previous policies

[658]John Solomos, *Race and Racism in Britain* (3rd edn, Palgrave Macmillan 2003) 38.
[659] Ibid 39; G Plank, *Rebellion and Savagery: The Jacobite Rising of 1745 and the British Empire* (University of Pennsylvania Press 2006) 12-14; Javier García Oliva and Helen Hall, *Constitutional Culture, Independence and Rights: Insights from Quebec, Scotland, and Catalonia* (University of Toronto Press 2023) 74.
[660] John Solomos, *Race and Racism in Britain* (3rd edn, Palgrave Macmillan 2003) 39.
[661] Ibid 40.

on immigration and laid the foundation for subsequent legislation on this issue until after the Second World War".[662]

Further to the anti-Semitism, some of the agitation against Jewish people stemmed from a competition for resources. Solomos observes that government action against Jewish immigration was "partly influenced by social and economic changes in the localities of Jewish settlement", there was competition for jobs, housing and amenities in East London, for example, which had a high settlement of Jews.[663] This is reminiscent of the race riots that occurred decades later in Nottingham and Notting Hill, between members of the white working class and the Caribbean community, reported to have been motivated by racial intolerance and competition over resources.[664] The ways in which Irishness and Jewishness has been treated in Britain, and the parallels between Jewish and black immigration highlights Britain's complex relationship with race and culture. The section below examines the history of black migration into Britain – forced (slavery) and free (commonwealth) – and Britain's response to it.

6.3 Black immigration – Pre-Commonwealth

Before migration from British colonies in the 19th century, black ethnic minorities already existed in Britain. Black slaves first appeared at the end of the 16th century as an aftermath of

[662] John Solomos, *Race and Racism in Britain* (3rd edn, Palgrave Macmillan 2003) 40.
[663] Ibid 41; See also, Bernard Gainer, *The Alien Invasion: The Origins of the Aliens Act of 1905* (Heinemann 1972) 3.
[664] BlackPast, 'The Notting Hill Riots (1958)' https://www.blackpast.org/global-african-history/notting-hill-riots-1958/ accessed 14 June 2021; Mark Olden, 'White riot: The week Notting Hill exploded' *The Independent* (London, 4 June 2020) https://www.independent.co.uk/news/uk/home-news/white-riot-week-notting-hill-exploded-912105.html accessed 14 June 2021.

the Spanish wars, and increased in numbers from the 17th century onwards, due to slave trade on the African Coast by Britain and other major European powers.[665]

Malik highlights the complicated way in which British colonialism impacted the response to slavery in the domestic sphere, by giving rise to – arguably – a false dichotomy between colonial law and English domestic law.[666] The courts were tasked with distinguishing between "the legitimacy of slavery in the colonies and the principle of the freedom of the individual in relation to slavery in Britain".[667] According to Lester and Bindman, the English courts were prepared to recognize the legality of slavery, given the lucrative benefits Britain derived from it and the social respectability of the business of slavery.[668] The courts therefore sought to resolve the difficulty by "treating slavery as a relationship created under local colonial law and enforcing that relationship as a matter of colonial rather than domestic English law. In this way the judges could uphold the condition of servitude overseas without violating British ideals of personal liberty".[669]

To illustrate the forgoing, in a 1701 case, a merchant claimed in the English courts £20 for the sale of a negro in London to another.[670] CJ Holt began by restating the principle of individual liberty that "as soon as a Negro comes into England he becomes free; and one may be a villein in England but not a slave", however, he suggested that on a practical note, the plaintiff ought to have alleged that "the sale of the Negro was in Virginia and by the laws of that country

[665] Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman Group Limited 1972) 27.
[666] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 36.
[667] Ibid.
[668] Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman Group Limited 1972) 28.
[669] Ibid 29.
[670] *Smith v Browne and Cooper* (1701) Holt K.B. 495.

Negroes are saleable; for the laws of England do not extend to Virginia, and we cannot take notice of their law but as set forth".[671] He thus allowed the plaintiff to amend his claim accordingly to state that the law of Virginia applied, under which law Negroes could be "sold as chattels".[672] Lester and Bindman examine the conflicting judicial attitudes arising from Justice Holt's dichotomy, asserting that this reflected "the growing contradiction between colonial slavery and British ideals of liberty".[673]

One could argue that the dichotomy between colonial law and English law is false and ironic since Britain perpetrated slave trade in its colonies and even allowed slavery and slave trading[674] within its soil. To accord a difference in status to a slave in Britain and a slave in a British colony is false, since both slaves are as much subjects (or rather hostages) under English law, save that the colonies are a convenient distance away from Britain. Therefore, the 'law of personal liberty' proclaimed as a British ideal, ought to apply to all slaves under British control or conversely, colonial law ought to apply to all slaves under British control.

Another case that made this contradiction apparent is the Somerset Case[675] of 1772, which involved James Somerset, a slave captured in Africa and brought to the Americas in 1749, and later sold in Virginia to Charles Stewart, a Scottish merchant and slave trader, who in 1769 brought Somerset to England.[676] Somerset escaped after two years but was recaptured and Stewart decided to sell him back into slavery in Jamaica.[677] In late 1771, Somerset was

[671] *Smith v Browne and Cooper* (1701) Holt K.B. 495.
[672] Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman Group Limited: London 1972) 29.
[673] Ibid 29-31.
[674] Ibid 29.
[675] *Somerset v Stewart* (1772) 98 ER 499.
[676] George Van Cleave, '*Somerset's Case* and Its Antecedents in Imperial Perspective' (2006) 24(3) Law and History Review 601.
[677] Ibid.

awaiting shipment aboard a ship on the Thames, when by the efforts of an ecumenical abolitionist network in London, a writ of habeas corpus was sought from the Court of King's Bench to obtain Somerset's freedom, thereby beginning the Somerset Case.[678] In the judgement, Lord Mansfield held as follows:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[679]

The judgment stood in stark contrast to the position of the day regarding slave trade in Britain's colonial territories, which as stated above was conveniently deemed separate from domestic English Law. Aware of the political and economic realities of slavery, Justice Mansfield avoided the issue of the relationship between English Common law and colonial law and instead characterised slavery as arising from positive law.[680] Indeed, the Lord Justice was cognizant of the incongruity of the judgment and alludes to this by stating as above,

[678] George Van Cleave, '*Somerset's Case* and Its Antecedents in Imperial Perspective' (2006) 24(3) Law and History Review 601.
[679] *Somerset v Stewart* (1772) 98 ER 499.
[680] George Van Cleave, '*Somerset's Case* and Its Antecedents in Imperial Perspective' (2006) 24(3) Law and History Review 606.

"Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England".[681]

Once more the uneasy dichotomy arises. But it is not necessarily the question of morality, or the slave's liberty in Britain or overseas, that matters, but, it seems, the location of the slavery – specifically Britain. Indeed, in the 1827 case of the *Slave Grace,* Lord Stowell held that the *Somerset* case did not affect the legality of slavery in the colonies.[682] He observed that the arguments in *Somerset* did not "go further than the extinction of slavery in England as unsuitable to the genius of the country, and to the modes of enforcement: they look no further than to the peculiar nature, as it were, of our own soil; the air of our island is too pure for slavery to breathe in… the methods of force and violence which are necessary to maintain slavery are not practicable upon this spot".[683] This superiority attitude is important to note as it is the bedrock upon which Britain's eventual so-called multiculturalism was laid.

Malik suggests that although the eventual abolition of slavery in the colonies indicated the universalising of the principle that race discrimination was wrong, subsequent developments have shown that race remained an important factor in the treatment of ethnic minorities in the domestic context.[684] A pertinent question arises here, does Britain's response to slavery provide any insight into its response to ethnic diversity in contemporary times?

[681] *Somerset v Stewart* (1772) 98 ER 499.
[682] *The Slave Grace* (1827) 2 St.Tr.(N.S.) 273.
[683] Ibid; Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman Group Limited: London 1972) 33.
[684] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 36.

What is striking in the foregoing brief exploration of slavery, is the strict separation between Britain and its colonies, and the need for Britain to uphold its "British values" within its own soil without similar regard to its colonies. The attitude of British superiority versus the implied inferiority of its colonies is apparent in the foregoing words of LJ Stowell. In contemporary Britain, one could argue that a more nuanced separation and indeed the superiority attitude exists between the majority white British population and the ethnic minority population. Britain has always been accused of racism and recently, following a controversial report by the Commission on Race and Ethnic Disparities on racism in the UK, UN independent human rights experts "denounced the government-backed report, saying that it further distorted and falsified historical facts, and could even fuel racism and racial discrimination".[685]

6.4 Commonwealth Immigration

The foregoing discussion has provided an important overview of the early history of migration and cultural diversity in Britain. These early migrant populations, though formative, were nonetheless minimal in comparison to the great influx of immigrants after the Second World war. After the war, Britain began to experience a decline in its position in world politics. The war had greatly weakened its financial and industrial positions through the liquidation of nearly a quarter of its overseas assets and the accumulation of a large overseas financial debt (about £3,500 million).[686] The war had also created gaps in manpower, and in order to fill

[685] United Nations, 'Rights experts condemn UK racism report attempting to 'normalize white supremacy' *UN News* (19 April 2021) https://news.un.org/en/story/2021/04/1090032 accessed 2 August 2022.
[686] Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (1st edn, Routledge 2002) 108.

them, the Attlee government looked primarily to meet its labour shortage by recruiting from Southern Europe – this is contrary to the popular belief that there was active recruitment from the Commonwealth.[687] Nonetheless, the bulk of immigrant workers came from Britain's colonial and increasingly ex-colonial territories with the creation of the New Commonwealth which as we will see was not expected. The arrival of the *Empire Windrush* ferrying 492 Jamaicans at Tilbury Docks on 21 June 1948 is "typically represented as the first wave of a mass migration to the United Kingdom after World War II" and "a precursor of the 1950s migrant flow".[688]

At this time, whilst contending with the industrial and economic effects of the war, Britain was also confronting decolonisation and the loss of its Empire identity. As Ashcroft and Bevir assert, the Empire was "a fundamental part of British national identity from at least the mid-Victorian period up until the mid-twentieth century".[689] But as it were, there was increasing demand for the recognition of the principle of national self-determination by the imperial powers, as a key concept of international relations.[690] Yet having established itself as a formidable empire through its vast colonies, the prospect of decolonisation naturally threatened Britain's position in the world and its sense of self. Subsequently, the Attlee government sought to "preserve British identity and influence through legislation aimed at securing Britain's position at the head of a renewed Commonwealth sphere of influence".[691]

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[687] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 27.
[688] Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press 1997) 111.
[689] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T. Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 26.
[690] Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (1st edn, Routledge 2002) 110.
[691] Richard T Ashcroft and Mark Bevir, 'Multiculturalism in contemporary Britain: policy, law and theory' Critical (2018) 21(4) Review of International Social and Political Philosophy 5.

The British Nationality Act of 1948 (BNA) was thus enacted which granted all British subjects in the Commonwealth the right to immigrate to the UK. Rather than creating a singular British citizenship, the BNA created sub-groups of Commonwealth Citizenship, among them – "Citizenship of the United Kingdom and Colonies (CUKCs)" and "Citizens of Independent Commonwealth Countries (CICCs)".[692] "These two categories covered the vast majority of British subjects, with the former receiving subjecthood directly from the UK and the latter via their domestic citizenship. Both had broadly the same rights in relation to the UK, including the right to live and work there, to vote, and even to stand for Parliament".[693] Ashcroft and Bevir suggest that the political response to the threat to British power - that is, the BNA - unintentionally created the modern multicultural Britain.[694]

The unforeseen effect of the BNA was the great influx of the New Commonwealth citizens into Britain. This, however, was never the intention of parliament. As Hansen notes, the BNA was never intended to "sanction a mass migration of New Commonwealth citizens."[695] He asserts that the possibility of substantial numbers exercising their right to reside in the UK was in fact never discussed in parliamentary debate, private papers or the press.[696] The material advantages to immigrants was scarcely considered since the importance of the BNA was believed to be symbolic not material – privileges such as free entry to Britain, voting in

[692] Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (1st edn, Routledge 2002) 116.
[693] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 27.
[694] Richard T Ashcroft and Mark Bevir, 'Multiculturalism in contemporary Britain: policy, law and theory' Critical (2018) 21(4) Review of International Social and Political Philosophy 5.
[695] Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000) 53.
[696] Ibid.

elections etc, having never been exercised by 'colonials' on a grand scale, could thus not be fathomed as anything more than symbolic.[697]

One might say that such an expectation was rather incongruous with the clear purpose of the BNA which, fundamentally, was to allow British subjects free entry into Britain. But one could argue, however, that the expectation was quite consistent with Britain's overall attitude towards non-white immigrants – an abstract and superficial show of recognition and acceptance that does not translate practically. Hansen contends though, that policy makers could not have reasonably predicted the migratory effect of the BNA, since their understanding of the complex issue of British subjecthood was based upon past migratory experience.[698] He asserts as follows: -

> To have defined the central issue in 1948 as migration would have been to predict the unforeseeable: the achievement of unprecedented prosperity and full employment in the post-war years and the development of relatively inexpensive, rapid transportation between the UK and the colonies. Failure to recognise these developments – and the migration they encouraged - did not reflect a lack of political prescience; it reflected a reasonable definition and understanding of the issues at stake in the drafting of the British Nationality Act.[699]

[697] Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000) 53.
[698] Ibid 55.
[699] Ibid.

He does concede that the BNA was "rather differentiated and conditional" in reference to the Old Dominions and the colonies. The Old Dominions members' right to enter Britain as "British 'kith and kin' was viewed by major politicians in all parties as unconditional and innately valuable", whereas the right of entry of colonial subjects was "passively accepted as a logical consequence and symbolic expression of subjecthood's indivisibility, and believed to be rightly limited and temporary".[700] Therefore, and particularly in the case of non-white Commonwealth immigrants, the BNA was primarily symbolic, intended to restore Britain's waning global influence by reinstating it as the "mother-country" of a New Commonwealth.

Consequently, there were attempts to discourage further Commonwealth migration by the Labour government and its Conservative successor, albeit this was done informally, pressuring the Jamaican, Indian, and other governments to put administrative roadblocks in the way of potential immigrants.[701] This was conducted "as private government-to-government business, because any attempt to distinguish between Old and New Commonwealth immigrants would have been seen as racist, undermining the rhetoric of British Exceptionalism that justified the UK's role as the head of a multiracial Commonwealth".[702] It is clear that the British government's primary concern was restoring and maintaining its sphere of global influence and the BNA was a means to that end. It is also interesting to observe the typical and ironic racist posture of not wanting to be seen as racist whilst in fact perpetuating racism, playing out in these government actions.

[700] Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000) 55.
[701] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 28.
[702] Ibid.

The mass influx of New Commonwealth citizens into Britain eventually triggered public and political resistance to its scale, including the race riots in 1958.[703] According to Favell, it is during the outbreak of these riots that "the issue of immigration – and the inevitable integration it foresaw – first became a central political concern".[704] News headlines following the riots announced: "The Government must not dither for fear of being considered unsympathetic to the coloured immigrants"; "Can Britain avoid controlling immigration?"; "The number of immigrants must be kept down so that they can be assimilated into the population".[705] The *Economist* reported shortly thereafter that the "officials in Whitehall believed that the liberal line - uncontrolled immigration - can be held for a few more years, but not indefinitely. Far from thinking that the British people will get used to colour ... this school of opinion in Whitehall and beyond feels that when the tide of colour rises to a certain, as yet unspecified, point, the mass of British voters will demand that some check be imposed".[706] Consequently, the Home Secretary instructed the Committee on colonial immigrants to "consider the desirability of assuming statutory powers to deport 'undesirable' Commonwealth immigrants," parliament, however, ultimately chose not to legislate along the lines suggested by the Committee mainly because public concern had waned over time.[707]

[703] Richard T Ashcroft and Mark Bevir, 'Multiculturalism in contemporary Britain: policy, law and theory' Critical (2018) 21(4) Review of International Social and Political Philosophy 5. For analysis of the Notting Hill and Nottingham riots, see Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000) chapter 4.

[704] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 103.

[705] Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press 1997) 131.

[706] Ibid.

[707] Randall Hansen, Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation (Oxford University Press 2000) 89.

In the decade following Windrush, 'uncontrolled immigration' became front and centre in public and political polemics in Britain. As one MP stated in Parliament: "the core of the problem is coloured migration. We must ask ourselves to what extent we want Great Britain to become a multi-racial community… a question which affects the future of our race and breed is not one we should merely leave to chance".[708] Nevertheless, there were no forthcoming amendments to the BNA. Ashcroft and Bevir explain that the expansive definition of citizenship created by the BNA could not be the sole criterion for limiting immigration, thus new restrictions would need to operate on proxies of birth and ancestry rather than citizenship, which in effect meant race.[709] Karatani further illuminates the inaction concerning the BNA; she asserts that the British government still held the idea that the Commonwealth assured British power and influence in the international arena, thus it needed to maintain Commonwealth citizenship and as a result, it could neither abolish Commonwealth citizenship by amending the BNA, nor impose immigration control exclusively on New Commonwealth citizens.[710]

As time went on, the 'Commonwealth ideal' waned in the late 1950s and early 1960s. There was also increased pressure for reform following the 1958 race riots, with both Conservative and Labour backbenchers questioning the effectiveness of immigrant assimilation through the granting of citizenship rights.[711] The cumulative effect of this was the passing of the Commonwealth Immigrants Act 1962 (CIA 1962) by the ruling Conservative government. It

[708] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 173.
[709] Richard T Ashcroft and Mark Bevir, 'Multiculturalism in contemporary Britain: policy, law and theory' Critical (2018) 21(4) Review of International Social and Political Philosophy 5.
[710] Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (1st edn, Routledge 2002) 128.
[711] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 29.

was the first statutory attempt to restrict Commonwealth citizens' right to free entry into Britain by, inter alia, limiting it to "(1) those born in the UK; and (2) those CUKCs whose passports were issued under the authority of London rather than by a colonial administration".[712]

Hansen avers that the elaborate immigration requirements was an indirect way of saying that immigration controls did not apply to British people born in the country, as well as those who had migrated to the Old Dominions before 1962.[713] The CIA 1962 effectively ended the "imperial tradition", which one Conservative cabinet minister termed as: "our great metropolitan tradition of free entry from every part of Empire".[714] According to a Home Office memorandum, the CIA 1962 was necessary due to the "strain imposed by coloured immigration on the housing resources of certain local authorities", and the "dangers of social tension inherent in the existence of large unassimilated coloured communities".[715] Subsequent legislations followed the CIA 1962. The Commonwealth Immigration Act 1968 and the Immigration Act 1971 were similarly aimed at restricting immigration. Ashcroft and Bevir summarise their cumulative effect as limiting "non-white immigration from the New Commonwealth whilst simultaneously leaving the door ajar for white 'British' immigrants from the Old Commonwealth".[716]

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[712] Ibid. See also, Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000) 109-110.
[713] Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press 2000) 110.
[714] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 173.
[715] Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (Routledge 1st ed 2002) 128.
[716] Richard T Ashcroft and Mark Bevir, 'Multiculturalism in contemporary Britain: policy, law and theory' Critical (2018) 21(4) Review of International Social and Political Philosophy 5.

6.5 Race Relations

Concurrent to the immigration controls in the 1960s-70s was the issue of race discrimination. There was increasing recognition of the disadvantaged economic and social position of immigrants.[717] In his 1966 speech, Labour Home Secretary, Roy Jenkins, commented on the expectations of second generation immigrants whom he referred to as "coloured Britons" seeking the same opportunities as other Britons. He said, "If we allow their expectations to be disappointed we shall both be wasting scarce skills and talents and building up vast troubles for ourselves in the future. In the next decade this to my mind, will become the real core of the problem".[718]

During this era, political and legal debate on immigration control was always accompanied by a debate on the legal regulation of race relations.[719] By way of illustration, the Labour government passed both the Commonwealth Immigration Act and the Race Relations Act in 1968. Ashcroft and Bevir explain this two-fold approach as: "The price extracted for this racialised tightening of *external* immigration controls was the imposition of an increasingly potent *internal* race relations regime over the same period, with the Acts passed by Labour in 1965, 1968 and 1976".[720] They contend that this bifurcated legal framework created the distinctive British form of multiculturalism, with tough external immigration restrictions on

[717] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 41.
[718] Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman Group Limited 1972) 84.
[719] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 43.
[720] Richard T Ashcroft and Mark Bevir, 'Multiculturalism in contemporary Britain: policy, law and theory' Critical (2018) 21(4) Review of International Social and Political Philosophy 5.

the one hand, and strong internal race relations on the other, favouring integration over assimilation.[721] Consequently, there were a series of measures to tackle discrimination. Institutions such as the Race Relations Board, the Community Relations Commission, and the Commission for Racial Equality were created with the purpose of confronting direct and indirect forms of racial discrimination.[722] Malik points out that although the Race Relations Act of 1976 was mainly an anti-discrimination law with little room for the accommodation of difference, it included provisions that allowed positive action for the special needs of racial groups in areas such as education, training and welfare.[723]

6.6 Integration to Multiculturalism

The race relations regime set the tone for a shift from assimilation to integration and consequently to multiculturalism. As Grillo explains, there existed (exists) in Britain three main positions informing public and political attitudes on cultural diversity: the "rejectionist" standpoint, which rejects cultural diversity and is anti-immigration (see for example the politics of Enoch Powell[724]); the "assimilationist" standpoint which demands there "should be no deviation from British cultural tradition, but accepts that others may be accommodated within it: they are welcome to stay if they wish, but must become like 'us'"[725]; and the "integration" standpoint, which more or less follows the 'Jenkins formula'. Integration took

[721] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 29.
[722] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 176.
[723] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 51; Race Relations Act of 1976, s 35.
[724] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 105.
[725] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 177.

hold in the mid-1960's, marking a shift from assimilation. Roy Jenkins explained integration in his famous 1966 speech as follows: -

> Integration is perhaps rather a loose word. I do not regard it as meaning the loss, by immigrants, of their own national characteristics and culture. I do not think that we need in this country a 'melting pot,' which will turn everybody out in a common mould, as one of a series of carbon copies of someone's misplaced vision of the stereotyped Englishman … I define integration, therefore, not as a flattening process of assimilation but as equal opportunity, coupled with cultural diversity, in an atmosphere of mutual tolerance.[726]

It is interesting that this is of course happening at the same moment in history as the US Civil Rights movement. Obviously, the contexts and history of the UK and US are radically different, and Jenkins in fact seems to be consciously rejecting some of the US language/ideology here.

The shift to integration saw Britain among the first in the Western world to turn against the idea of assimilating immigrants, thereby instituting a series of exemptions from general laws to accommodate the special needs of ethnic and religious minorities, as well as funding activism for the needs of these communities.[727] Politically there was a cross-party consensus on immigration which helped create a multifarious and distinctive British approach to multiculturalism, which combined rigorous immigration controls with internal race-relations

[726] Roy Jenkins, Essays and Speeches (Collins 1967) 267.
[727] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 31.

and a level of "pluralist accommodations".[728] Internally, integration in Britain comprised of a system with an anti-discrimination framework, that recognised and accommodated cultural difference.[729] This has been referred to as "pluralistic integration" – defined as a system in which "participation is on the basis of equality, within a framework of common legal and political institutions, but with some degree of recognition for diversity and specificity".[730]

According to Grillo, a compromise of "here but different" pervaded public policy from the mid-1960s.[731] He asserts that this approach "constituted a 'weak' multiculturalism" –recognizing cultural diversity (to varying extent and up to a point) but promoting acculturation in many areas of life and attempting to tackle inequalities".[732] McGoldrick argues, however, that multiculturalism was a "model of management rather than of genuine integration". He asserts that it was based on the "assumption of liberal tolerance rather than of participation in citizenship", requiring minority groups to adjust to the dominant cultural identity while allowing them certain concessions. In this way, therefore, "it was never intended as a model for pursuing social equality or for addressing justice for individuals".[733]

There is an element of truth to the sentiment since while the UK has made some effort to accommodate minority group demands, as we will see, when confronted with conflicting demands, the majority wins. On the issue of social equality and justice for individuals, the reality has been varied. Both proponents and opponents of multiculturalism rely on these

[728] Ibid 32.
[729] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 177.
[730] Ibid.
[731] Ralph Grillo, 'British and others: from 'race' to 'faith' in Steven Vertovec and Susanne Wessendorf (eds) *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Taylor & Francis Group 2010) 52.
[732] Ibid.
[733] Dominic McGoldrick, 'Multiculturalism and its Discontents' (2005) 5(1) Human Rights Law Review 38.

aims to further their agendas. Proponents will argue that multiculturalism is necessary in a multi-ethnic society to ensure social equality and justice for individuals in minority groups, whereas opponents claim multiculturalism allows for cultural norms that privilege patriarchy, thereby disempowering women in minority groups, the opposite of social equality and justice for all individuals.

During this period, education, specifically the education of children from ethnic minorities, became an important issue for public debate. Discrimination and disparities of achievement among minority and majority children existed in the educational system necessitating a need to address this.[734] Initially, educational issues, as with issues generally relating to immigrants, were not "easily disentangled from the racialized rejection and perceived 'alienness' of the newcomers" and were addressed by reference to two ideologies; the philosophies of anti-colour prejudice of the Rev'd Martin Luther King Jr, and the welcoming of cultural minorities and their cultural practices, albeit usually in superficial ways.[735] This response, however, failed to address the "distinctive needs" of minority children and their disadvantaged position became apparent.[736]

Multiculturalism as a policy response thus first appeared within the context of education in the 1970's and 1980's. This perhaps was to be expected, since education (being the main public instrument of cultural and civic socialization) was naturally the top institution to

[734] Ralph Grillo, 'British and others: from 'race' to 'faith' in Steven Vertovec and Susanne Wessendorf (eds) *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Taylor & Francis Group, 2010) 52.
[735] Tariq Modood and Stephen May, 'Multiculturalism and education in Britain: an internally contested debate' (2001) 35 Intl Journal of Educational Research 306.
[736] Ibid.

facilitate the inclusion of ethnic minorities and the shaping of a civic and national identity.[737] The Swann report, which revealed African-Caribbean children achieved lower results than white and Asian children, "shifted its emphasis away from overt anti-racist strategies, toward a form of 'inclusive multiculturalism' as signalled by its formal title *Education for All*".[738] Similar to the integration vision, the Swann report envisioned multicultural education as enabling the full participation of both the minority and majority groups in shaping a society united by commonly held British ideals and practices, while at the same time granting minorities the freedom to maintain their distinctive identities, albeit within the framework of the British ideals held in common.[739]

Although the benefits of a multicultural educational system were acknowledged, there were limits to the extent of the 'multiculturalist accommodation'. For instance, it was acknowledged that diversity in language was a "positive asset" yet it was argued that minority languages should not form part of formal education and they ought to be restricted to the domestic sphere and the minority group.[740] Similarly, the "notion of separate 'ethnic minority schools', particularly 'Islamic' schools[741], was rejected despite the longstanding presence of Anglican,

[737] Local Multidem Project, Muslim identities and the school system in France and Britain: The impact of the political and institutional configurations on Islam-related education policies' ECPR General Conference (September 2007) 2.
[738] Tariq Modood and Stephen May, 'Multiculturalism and education in Britain: an internally contested debate' (2001) 35 Intl Journal of Educational Research 307.
[739] The Swann Report (1985) http://www.educationengland.org.uk/documents/swann/swann1985.html accessed 17 August 2022.
[740] Tariq Modood and Stephen May, 'Multiculturalism and education in Britain: an internally contested debate' (2001) 35 Intl Journal of Educational Research 307.
[741] The Commission on British Muslims and Islamophobia and the Association of Muslim Social Scientists, rejected the view that Muslim schools were responsible for division, arguing that "the word 'separate' is rarely used negatively in respect of Christian or Jewish faith schools". Ralph Grillo, 'British and others: from 'race' to 'faith' in Steven Vertovec and Susanne Wessendorf (eds) *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Taylor & Francis Group 2010) 60.

Catholic, and Jewish schools".[742] It should be noted, however, that unlike Judaism and Sikhism, Islam is not an ethno-religion, thus Muslim schools are not strictly 'ethnic minority' schools. Further, faith schools with an Islamic character do now exist in England and have been in existence for a while.[743]

The Swann report also rejected the idea of cultural or religious instruction in schools, asserting that the role of education was not "to reinforce the values, beliefs, and cultural identity which each child brings to school".[744] [745] It is necessary to note that despite the restrictions on multicultural policies in education, Britain has been more accommodating of Muslim identities in state schools compared to France. Unlike France which legislated to ban religious symbols in schools, Britain has no law or regulation on religious dress in schools and schools have typically adopted their own policies. The wearing of the Muslim headscarf for instance, is usually accepted within public-funded schools although there have been occasional incidents involving Islamic dress.

One such incident is the 2004 case of 15 year-old Shabina Begum whose school did not allow her to attend lessons in a jilbab. She filed a case at the London High Court alleging that she was denied "her right under article 9 of the ECHR to manifest her religion or beliefs and

[742] Tariq Modood and Stephen May, 'Multiculturalism and education in Britain: an internally contested debate' (2001) 35 Intl Journal of Educational Research 307.

[743] GOV.UK, London Islamic School https://get-information-schools.service.gov.uk/Establishments/Establishment/Details/132797 accessed 29 May 2023.

[744] The Swann Report (1985) http://www.educationengland.org.uk/documents/swann/swann1985.html accessed 17 August 2022.

[745] In practice, however, the current arrangements for setting the curriculum of religious education in non-faith schools allows for the consultation and participation of local faith communities. Although only the Church of England is given a place as of right on the Committee setting the syllabus, local authorities will invite representatives from other religious groups in the relevant population. Faith schools will of course set their own schedule and materials for R.E. including Muslim ones. Javier García Oliva and Helen Hall, *Religion, Law and the Constitution* (Routledge 2017).

violated her right not to be denied education under article 2 of the First Protocol to the Convention".[746] Begum lost the High Court case, but the Court of Appeal found that Begum had been unlawfully denied the right to manifest her religion contrary to article 9 of the ECHR. The school appealed and the House of Lords found that the limitation on Begum's article 9 rights was justified in light of other parties' interests. It should be noted that the school had arrived at its uniform policy in consultation with the local Muslim community, and a significant number of voices from that quarter wanted the jilbab rejected as a uniform option as there were concerns about pressure being applied on girls to adopt the more conservative option.[747]

In 2007, another high-profile case was heard involving a 12-year-old girl (X) in an unnamed Buckinghamshire school, who wanted to be allowed to wear a full-face veil (niqab) to school.[748] The court similarly found that interference with X's article 9 rights was justified for the protection of the rights and freedoms of others. It can be extremely challenging to disentangle the various strands of thought woven into these judicial decisions. There were genuinely conflicting interests at stake and legitimate concerns for pupil welfare, both individual and collective, but this does not mean that wider currents of social and political thought were not also at play.

Shortly after X's case, then education secretary Alan Johnson announced that schools would be able to ban pupils from wearing full-face veils "on security, safety or learning grounds under

[746] *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15 [1].
[747] Ibid [18].
[748] *R (on the application of X) v Y High School* [2007] EWHC 298 (Admin).

new uniforms guidance issued by ministers".[749] It is important to note – and this is largely acknowledged in academic discourse - that attitudes and response to Muslim identity in society are largely influenced by a fear of terrorism following 9/11. Furthermore, the perceptions of wider society within Islamic communities shifted as members suffered increased levels of hostility and discrimination. Government initiatives in education as elsewhere often exacerbated the sense of marginalisation experienced by the beleaguered.

Attempts to progress from a monocultural educational system to a multicultural one were not without opposition. As Grillo observes, historically, British schools have - explicitly or implicitly - been primarily concerned with maintaining the English language and mainstream British culture.[750] According to Kalev, although British society aims towards toleration and absorption of ethnic minorities, "the 'bottom line' is that Great Britain is a British country and so is entitled to determine its own British cultural and moral norms in legislation".[751] There is thus perpetual tension between the commitment to majority rule and the accommodation of cultural difference. Indeed, the limits to multicultural education described above reinforce this position as do the comments of the Secretary of State for Education, Sir Keith Joseph, in 1986. He stated, "Our schools should transmit British culture, enriched as it has been by so many traditions . . . It would be unnecessary . . . and I believe wrong, to turn our education system upside down to accommodate ethnic variety or to jettison those many features and practices which reflect what is best in our society and its institutions".[752]

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[749] BBC News, 'Schools allowed to ban face veils' (20 March 2007) http://news.bbc.co.uk/1/hi/education/6466221.stm accessed 30 August 2022.

[750] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 202.

[751] Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' 51 (2004) Sex Roles 344.

[752] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 202.

Although the Education Reform Act of 1988 (the government's response to the Swann report) was dedicated to "cultural pluralism"[753] in education, it appeared to affirm the foremost place of British tradition in education, and was consequently criticized "as being too ethnocentric and assimilationist for it reaffirmed the place of Christian traditions and restricted the place of multiculturalism to options separated from the mainstream curricula".[754] Despite criticism of the 1988 Act, the centrality of British tradition in education was once again reaffirmed in 1996 by the government's Chief Adviser on the curriculum who called for the "development of a British cultural identity in all schoolchildren, regardless of their ethnic background".[755] On the issue of multicultural education as a whole, Modood and May aver that the central government largely overlooked the concept and locally it was only patchily experimented with by some local authorities and schools.[756]

6.7 Church and State Relations

There are three classic models which examine Church/state arrangements; they are – national Church, separatist and hybrid/cooperationist.[757] England is an example of a liberal democratic

[753] Felix Mathieu, 'The failure of state multiculturalism in the UK? An analysis of the UK's multicultural policy for 2000–2015' (2018) 18(1) Ethnicities 47.
[754] Local Multidem Project, 'Muslim identities and the school system in France and Britain: The impact of the political and institutional configurations on Islam-related education policies' ECPR General Conference (September 2007) 16.
[755] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 202.
[756] Tariq Modood and Stephen May, 'Multiculturalism and education in Britain: an internally contested debate' 35 (2001) International Journal of Educational Research 308.
[757] Javier García Oliva and Helen Hall, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (1st edn, Routledge 2017) 48; Michael Minkenberg, 'The policy impact of church–state relations: family policy and abortion in Britain, France, and Germany' West European Politics (2003) 26(1) 195-217, 198.

country that has an established church[758], in contrast to the French system of *laïcité*, which is a paradigmatic example of a secular system.[759] While there remains "strong formal and legal ties",[760] historically, the national churches in Great Britain held immense political power and social influence, but this has gradually declined over the centuries.[761] García Oliva and Hall posit that rather than receding, the role of national churches within British society has "transformed"; whereas, historically, the established church was exclusive, oppressive and marginalising to non-members, it now has "a broad and inclusive approach to the understanding of religion".[762] Indeed, non-religious people who hold beliefs that are just as important to them as religion are also included within the contemporary broad and inclusive approach to religion.[763] This "transformation" was the result of growing discontent with the status quo which privileged the established church, to the detriment of citizens of other faiths.[764]

[758] "Nominally, the (Anglican) Church of England and the (Presbyterian) Church of Scotland are still 'established' and thus occupy a highly visible place in English and Scottish public life. This includes the fact that the Monarch is still the head of the Church of England and cannot be or marry a Catholic, that Church appointments are Crown appointments, that the Church of England carries out a variety of state functions (such as the coronation), and that the Archbishops of Canterbury and York, the Bishops of London, Durham, and Winchester, and the 21 most senior of the other diocesan bishops of the Church of England have seats in the House of Lords within the framework of the whole United Kingdom." Michael Minkenberg, 'The policy impact of church–state relations: family policy and abortion in Britain, France, and Germany' West European Politics (2003) 26(1) 203. See also K Boyle and J Sheen (eds), *Freedom of Religion and Belief. A World Report* (Routledge 1997) 316; D McClean, 'State and Church in the United Kingdom' in Gerhard Robbers (ed) *State and Church in the European Union* (Nomos 1996) 307–22.

[759] Michael Minkenberg, 'The policy impact of church–state relations: family policy and abortion in Britain, France, and Germany' West European Politics (2003) 26(1) 195-217, 197.

[760] Ibid 203.

[761] See the discussion on the evolution of church/state relations in Javier García Oliva and Helen Hall, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (1st edn, Routledge 2017) 11-49.

[762] Javier García Oliva and Helen Hall, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (1st edn, Routledge 2017) 61. See also, Baroness Hale, 'Secular Judges and Christian Law' Ecclesiastical Law Journal (2015) 17(2) 170–181, 172.

[763] Javier García Oliva and Helen Hall, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (1st edn, Routledge 2017) 61.

[764]Ibid 52.

García Oliva and Hall note that the response to inequality was not to deprive Anglicans of the privileges they enjoyed, but to extend these to other faith groups as and when there was demand for parity on a particular privilege – for instance, the right to carry out legally binding marriages.[765] Therefore, without any particular cohesive plan, a culture of inclusivity has been gradually borne out of an establishment that was historically exclusive and marginalising. Scholars have argued that the current state of affairs has developed not necessarily out of a generous mentality, but because inclusion is seen to be better than a complete overhaul of establishment privilege.[766] In this way, although one might think that a nation with an established church would not be welcoming of different religions and cultural beliefs, in this particular case it is, and it very much fits in with the British approach to multiculturalism that is accommodating of cultural difference.[767] While this approach is propitious to inclusivity, it has arguably resulted in lesser protection of the vulnerable members of cultural or religious minority groups, as there is reluctance to interfere with other people's beliefs – this will be demonstrated in the context of FGM in the forthcoming chapters.

6.8 Multiculturalism and Multicultural Policies

In 2000, "British multicultural orthodoxy,"[768] as Joppke puts it, was affirmed in the Runnymede Trust report which found that 'Britishness' had "systematic, largely unspoken racial

[765] Javier García Oliva and Helen Hall, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (1st edn, Routledge 2017) 52.
[766] Ibid.
[767] Adrian Favell, Philosophies of integration: Immigration and the idea of citizenship in France and Britain (Palgrave Macmillan Limited 2001) 142.
[768] Christian Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy' (2004) 55(2) The British Journal of Sociology 249.

connotations," i.e. whiteness, which was an "insuperable barrier" to integration.[769] Accordingly, "there was a need to move toward a 'multicultural post-nation', in which Britain would be a 'community of communities'".[770] Multiculturalism has thus been "an inescapable part of political discourse in the UK since the very beginning of the 21st century".[771]

According to Mathieu, multicultural policies (MCPs) in Britain "consists of multiple public programs and regulations that emphasize the recognition of newcomers as ethnic and racial minorities, for which the state arranges specific treatment, allowing immigrants to fully and fairly exercise their rights as British citizens without any discrimination".[772] MCPs are for example: provisions for Halal and Kosher meat for Muslims and Jews[773], and exemptions around the wearing of the Turban for Sikhs in the workplace.[774] The establishment of Muslim arbitration tribunals and Sharia councils affiliated with mosques, is another example of the faith-based approach to multiculturalism in Britain.[775] MCPs are implemented in Britain in a decentralised manner, and what is envisioned is the incorporation of MCPs within the broader state strategy rather than "making the building of a multicultural society a goal of the state".[776]

[769] Bhiku Parekh, *The future of multi-ethnic Britain: report of the Commission on the Future of Multi-Ethnic Britain* (Profile Books 2000) 38.
[770] Christian Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy' (2004) 55(2) The British Journal of Sociology 249.
[771] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 86.
[772] Felix Mathieu, 'The failure of state multiculturalism in the UK? An analysis of the UK's multicultural policy for 2000–2015' (2018) 18(1) Ethnicities 46.
[773] GOV.UK, 'Guidance Halal and kosher slaughter' (15 October 2015) https://www.gov.uk/guidance/halal-and-kosher-slaughter accessed 30 August 2022.
[774] Employment Act 1989 s 11 and s 12.
[775] Heidi S Mirza, 'Multiculturalism and the Gender Gap' in Waqar Ahmad and Ziauddin Sardar (eds) *Muslims in Britain: Making Social and Political Space* (Taylor & Francis Group, 2012) 124.
[776] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 87.

Multiculturalism has nonetheless faced constant opposition and criticism. Incidents such as the Rushdie affair in 1989, 9/11, the 2001 northern towns riots and 2005 London bombings have also significantly "tested belief in the value of diversity".[777] Speaking on the eve of the publication of the Cantle report, which investigated the 2001 northern riots, Home Secretary, David Blunkett, stated: "We have norms of acceptability and those who come into our home – for that is what it is – should accept those norms".[778] The Cantle report stressed the need for a "greater sense of citizenship, based on common principles which are shared and observed by all sections of the community," that it was essential to "agree common elements of 'nationhood'" such as the "universal acceptance of the English language" which would be rigorously required in minority communities, and overall for the "minority largely non-white community to develop a greater acceptance of, and engagement with, the principal national institutions".[779]

The violent events in the early 2000s caused British multiculturalism to come under strain, with the government re-emphasising more stridently that immigrants needed "to assimilate British values and traditions".[780] Joppke argues that British multiculturalism "is not really a philosophy of integration because it makes no reference to a totality that is the logical prerequisite for integration".[781] It is not clear what Joppke means by totality, possibly, strict assimilation whereby immigrants are required to relinquish their culture and fully adopt the

[777] Ralph Grillo, 'British and others: from 'race' to 'faith' in Steven Vertovec and Susanne Wessendorf (eds) *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Taylor & Francis Group 2010) 53.
[778] Christian Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy' (2004) 55(2) The British Journal of Sociology 249.
[779] Home Office, Community Cohesion: A Report of the Independent Review Team (Government Printing Office 2001).
[780] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 35.
[781] Christian Joppke, *Veil: mirror of identity* (Polity Press 2013) 83.

culture of the host country. In that case his statement sits contrary to the British vision of integration encountered thus far, in which totality is not desired rather, tolerance within a framework of certain core values and norms, with some accommodation of difference.

MCPs have been a particular target of criticism, charged with "promoting relativism and undermining shared values".[782] In a speech in 2004, then Prime Minister, Gordon Brown, acknowledged 'respect for diversity', but asserted that "Britain should never have justified 'a crude multiculturalism where all values became relative'".[783] Sales argues, however, that although multiculturalism is "invoked as the author of contemporary problems," critics rarely examine or provide examples of the culpable MCPs, relying instead on "anecdotal and sometimes fictitious evidence".[784] According to Sales, the reality is in fact that MCPs have never been implemented systematically in Britain. The exemptions for Sikh turbans, she argues for instance, were achieved through race relations legislation, since Sikhs are classed as an ethnic group within the Race Relations Act 1976[785], and the accommodation of the Muslim headscarf in schools has been based on local agreements often involving parents and local communities.[786] Thus in effect, the creation of MCPs has been "piecemeal rather than comprehensive", arising from local initiatives in response to requests to accommodate the specific needs of the particular minority group(s) within the locality.[787]

[782] Rosemary Sales, 'Britain and Britishness' in Waqar Ahmad and Ziauddin Sardar (eds) *Muslims in Britain: Making Social and Political Space* (Taylor & Francis Group 2012) 37.
[783] Ibid.
[784] Ibid.
[785] The House of Lords in *Mandla v Dowell Lee* [1983] 2 A.C. 548, recognised the Jewish and Sikh communities as distinct racial groups.
[786] Rosemary Sales, 'Britain and Britishness' in Waqar Ahmad and Ziauddin Sardar (eds) *Muslims in Britain: Making Social and Political Space* (Taylor & Francis Group 2012) 37.
[787] Ibid 38.

6.9 The Failure of Multiculturalism?

Criticism against multiculturalism has taken many forms amongst academics, politicians, and liberals. Among academics, multiculturalism has been criticized for "transgressing principles of liberal democracy; for essentialism; for treating cultures as static, finite and bounded ethnolinguistic blocs; for privileging patriarchy and disempowering women; for allowing a concern with 'culture' to override traditional social issues; or alternatively for tokenism and condescension".[788] Liberals argue that the foundational beliefs of multicultural policies as being incompatible with the principles of a liberal state, that MCPs often result in the "exploitation of group rights" which negatively impacts the minorities within the minority group, typically women.[789] A seemingly widespread belief among critics is, multiculturalism has failed and instead created a situation in which the society is made up of "separate communities", thus destroying solidarity and trust within society.[790]

In 2011, then Prime Minister, David Cameron, stated:

> Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream … We've even tolerated these segregated communities behaving in ways that run completely counter to our values ... This hands-off tolerance has only served to reinforce the sense

[788] Ralph Grillo, 'British and others: from 'race' to 'faith' in Steven Vertovec and Susanne Wessendorf (eds) *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Taylor & Francis Group 2010) 53.
[789] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 88.
[790] Anthony Heath and Neli Demireva, 'Has multiculturalism failed in Britain? (2014) 37(1) Ethnic and Racial Studies 161.

> that not enough is shared. And this all leaves some young Muslims feeling rootless. And the search for something to belong to and something to believe in can lead . . . [to] . . . a process of radicalisation.[791]

Similarly, Sniderman and Hagendoorn contended, "Britain and the Netherlands have promoted multiculturalism to expand opportunities for minorities to enjoy a better life and to win a respected place of their own in their new society. It is all the more unfortunate, as our findings will show, that the outcome has been the opposite - to encourage exclusion rather than inclusion".[792]

MCPs are accused of "indirectly promoting antagonism and mistrust within the overall society", by fostering "'parallel lives' by differentiating those groups from the broader society through preservation of distinct cultural norms and values"; there are also concerns about "the generational persistence of ethnic values and norms within the separate communities consolidating segregation through future generations".[793] Malik observes that since the 2005 London bombings, the foregoing sentiment has been a recurring rhetoric in the critique of the "British model of multiculturalism".[794] She argues that this was "crude reductionism" encouraged by politicians (both right and left) and those responsible for race relations, who, despite academic evidence to the contrary, insisted that Britain was 'sleepwalking to

[791] Gov.UK, 'PM's speech at Munich Security Conference' (5 February 2011) https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference accessed 29 August 2022.
[792] Paul M Sniderman and Louk Hagendoorn, *When Ways of Life Collide: Multiculturalism and its Discontents in the Netherlands* (Princeton NJ: Princeton University Press 2007) 5.
[793] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 93.
[794] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 55.

segregation'".[795] Malik refers to a report by Dr Ludi Simpson (Manchester University)[796] in which he observed that the trend was in fact towards integration, and that poverty, access to housing and education were the key contributors to social exclusion rather than geography.[797] This assertion is seemingly contradicted by the findings from the Cantle Report, albeit housing and education (among others) are ostensibly confirmed as contributors to social polarisation, as below:

> Whilst the physical segregation of housing estates and inner city areas came as no surprise, the team was particularly struck by the depth of polarisation of our towns and cities . . . separate educational arrangements, community and voluntary bodies, employment, places of worship, language, social and cultural networks, means that many communities operate on the basis of a series of parallel lives. These lives often do not seem to touch at any point, let alone overlap and promote any meaningful interchanges.[798]

Interestingly, Heath and Demireva who conducted an empirical study of minority ethnic groups so as to examine the alleged corrosive effects of multiculturalism – specifically, the cross-generational maintenance of an ethnic identity rather than a British identity, and segregation from the white majority – found that "all groups alike displayed major change

[795] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 55.
[796] Ludi Simpson 'Statistics of Racial Segregation: Measures, Evidence and Policy' (2004) 41(3) Urban Studies 661–81.
[797] Maleiha Malik, 'Progressive multiculturalism: the British experience' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 55.
[798] Home Office, Community Cohesion: A Report of the Independent Review Team (Government Printing Office 2001) 9.

across the generations in the direction of a British identity and reduced social distance".[799] In fact, contradicting the findings of the Cantle Report, they observed that although some South Asian groups, "do exhibit high levels of in-group marriage and friendship, they do not lead parallel lives since residential and workplace segregation is actually rather low".[800]

Heath and Demireva referred too to findings from other researchers[801] that corroborate their own findings, which overall is: "We have found no evidence that MCPs have had negative effects on social integration: the similarity of rates of intergenerational change for the different ethno-religious groups, albeit from rather different starting points, suggests that we are seeing in Britain general processes of intergenerational integration that have little to do with specific MCPs".[802] Their empirical study revealed that perceived discrimination (both individual and group) has some of the strongest effects on negative outcomes and is a plausible explanation for lack of integration and lack of a British identification.[803]

Despite the foregoing, David Cameron's remarks against multiculturalism marked a widespread position that multiculturalism has failed, died or is "in retreat," which has proliferated academic and public discourse.[804] As alluded above, much of the criticism centres around a charge of separatism and/or segregation. Abbasov frames it as follows:

[799] Anthony Heath and Neli Demireva, 'Has multiculturalism failed in Britain?' (2014) 37(1) Ethnic and Racial Studies 161.
[800] Ibid 177.
[801] See M Wright and I Bloemraad, 'Is there a trade-off between multiculturalism and socio-political integration? Policy regimes and immigrant incorporation in comparative perspective' (2012) 10(1) Perspectives on Politics 77-95; R Koopmans, 'Trade-offs between equality and difference: immigrant integration, multiculturalism and the welfare state in cross-national perspective' (2010) 36(1) Journal of Ethnic and Migration Studies 1-26.
[802] Anthony Heath and Neli Demireva, 'Has multiculturalism failed in Britain?' (2014) 37(1) Ethnic and Racial Studies 178.
[803] Ibid 177.
[804] See Chris Allen, 'Down with Multiculturalism, Book-burning and Fatwas, The discourse of the 'death' of multiculturalism, Culture and Religion' (2007) 8(2) An Interdisciplinary Journal 125-138.

"Multicultural policies are projected to cement separate communities where they will bond social capital instead of bridging it, whereby cultural standards and norms contrary to the values of broader society will be conserved, fostering segregation within the whole society".[805]

6.10 A New "Assimilationist" Integration

The backlash against multiculturalism has resulted in measures such as "the introduction of citizenship tests, the swearing of oaths during citizenship ceremonies and language proficiency requirements for new migrants, as well as repeated calls for an unambiguous disavowal of "radicalism" or "extremism" from Muslims in particular".[806] Abbasov argues that the backlash has also produced alternatives to multiculturalism where "cultural integration and assimilation is seen as the primary means to handle the societal threats that have originated from multicultural policies".[807] He cautions that it is crucial to examine what is meant by integration, as assimilation may occur in the name of integration.[808]

According to Kundnani, what is envisioned in the new integrationist discourse is an emphasis on "the Enlightenment values associated with secularism, individualism, gender equality, sexual freedom and freedom of expression as markers of civilizational superiority".[809] He asserts that efforts are made to 'civilise' Muslims in particular into adopting these values to

[805] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 93.
[806] Nasar Meer and Tariq Modood, 'Accentuating Multicultural Britishness: An Open or Closed Activity?' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 49.
[807] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 95.
[808] Ibid.
[809] Arun Kundnani, 'Multiculturalism and its discontents: Left, Right and liberal' (2012) 15(2) European Journal of Cultural Studies 155.

enable their integration into wider society; however, what emerges in effect, is not a society based on liberal values but "a liberal form of anti-Muslim racism".[810] These Enlightenment values may appear reasonable, but to a culturally-different immigrant they are primarily defined too narrowly as they fail to account for legitimate cultural differences, particularly in religious belief and practices. Joppke refers to this new approach as a "civic integration" arguing that the "liberal state is becoming more assertive about its liberal principles, and shows itself less willing to see them violated under the cloak of 'multicultural' toleration".[811] He interprets the new assertiveness "as a shift of emphasis from diversity to autonomy, in whose optic liberalism itself appears as a distinct way of life that clashes with other, non-liberal ways of life".[812] Arguably, this new post-multiculturalism approach to integration appears to resemble assimilation, rather than the Jenkins approach to integration.

Has multiculturalism then failed in Britain? The empirical study earlier referenced, suggests it has not, having found cross-generational change towards a British identity and reduced social distance among all ethnic minority groups.[813] According to Abbasov, research indicates that the arguments for the failure of multiculturalism are not in fact based on empirical evidence but strongly influenced by the negative political discourse, particularly on terrorism, extremism and radicalisation.[814] Yack who investigates whether multiculturalism indeed "poses a serious threat to the ideals and institutions" of liberal egalitarians such as Brian Barry

[810] Arun Kundnani, 'Multiculturalism and its discontents: Left, Right and liberal' (2012) 15(2) European Journal of Cultural Studies 155.
[811] Christian Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy' (2004) 55(2) The British Journal of Sociology 252.
[812] Ibid.
[813] Anthony Heath and Neli Demireva, 'Has multiculturalism failed in Britain?' (2014) 37(1) Ethnic and Racial Studies 161.
[814] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 95.

whose work he examines, comes to the conclusion that the multiculturalism threat is "vastly exaggerated" among critics and that "multiculturalism policies often test our tact and patience than our fundamental principles".[815]

Whilst separate communities and incidents of terrorism certainly exist in Britain, multiculturalism is arguably not the primary cause of this. Abbasov contends that it is the "perceptions and policies that have stemmed from discriminatory treatment by society at large" which have led groups to live parallel lives.[816] Ashcroft and Bevir argue as well that the current political discourse has failed to take into account the interrelated nature between multiculturalism, citizenship, and national identity in Britain, which has its genesis in the Empire and post-Empire regimes.[817] They assert that the failure to take the aforementioned into account, "facilitates the divisive, racially charged rhetoric that allows multiculturalism-as-immigration to become an empty signifier for all of contemporary Britain's social ills".[818]

6.11 Conclusion

To conclude, what has the foregoing exploration of British multiculturalism revealed about Britain's response to cultural diversity? The examination has revealed that a multicultural Britain – specifically, a non-white multicultural Britain - was never in fact intended. It came

[815] Bernard Yack, 'Multiculturalism and the Political Theorists' (2002) 1(1) European Journal of Political Theory 107.
[816] Namig Abbasov, 'The Crisis of Multiculturalism in the UK: Has it Failed?' (2015) 5(1) Caucasas International 63.
[817] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 39.
[818] Ibid.

about as the unintended consequence of an attempt to regain Britain's lost Empire status, by rebranding as Head of the Commonwealth. It is necessary to keep that in mind, as it is effectively, the foundation upon which Britain's (non-white) multicultural history sprung. Indeed, the posture of 'British superiority' can be traced throughout this history, from slavery to Commonwealth, to integration, to multiculturalism and back to a more assimilationist form of integration.

Realistically, any independent nation will have its own rightful sense of "superiority" which allows it to determine its national identity and values and norms; even the ECtHR somewhat accommodates this "right" through the doctrine of the margin of appreciation.[819] Britain thus has a right to its own intrinsic British culture and the basic values and norms that society as a whole must abide. However, the British superiority that is essentially at loggerheads with multiculturalism, is that which never intended to create a non-white multicultural society in the first place; and if that was never its intention, then opposition to multiculturalism is a natural response. One might argue that this is a reductive view, that there are other factors at play such as competition for resources, security concerns etcetera, and this is true. But one truth does not invalidate another. Moreover, with Britain's colonial past the notion of British superiority cannot be easily divorced from the matter of race.

[819] The margin of appreciation is a concept developed in the jurisprudence of the ECtHR, that "suggests an ambit of discretion, 'latitude of deference or error', or 'room for manoeuvre', given to national authorities in assessing appropriate standards of the Convention rights, taking into account particular values and other distinct factors woven into the fabric of local laws and practice". Yutaka Arai-Takahashi, 'The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry' in Andreas Føllesdal et al (eds) *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 62.

Consequently, discrimination, racism, and the "Othering" of ethnic and religious minorities is arguably a better explanation for a supposed lack of integration than multiculturalism is, or at the very least – for argument's sake – is as much a plausible explanation as multiculturalism. The incidents of unrest and riots across the UK have all reported "racial tensions" precipitated by claims of exclusion or prejudice in housing, employment, and education. Religious tension and aggression, particularly towards Muslims, also falls within the ambit of discrimination. Racial hatred and prejudice is an undeniable fact throughout British history with the natural consequence of separation. Is it unreasonable for a dehumanised and disadvantaged group to retreat into itself?

It is also the reality that in British society there is reluctance to speak openly and honestly about race. The Cantle Report revealed a "lack of an honest and robust debate, as people 'tiptoe around' the sensitive issues of race, religion and culture".[820] The reluctance to talk about racism makes it difficult to have effective dialogue and mutual understanding over the issues that affect ethnic minorities. In spite of the disadvantaged position of minorities, there is empirical evidence of cross-generational integration amongst the different ethnic groups in Britain. This essentially disperses the notion of a failure of multiculturalism and reinforces the notion that the greatest hindrance to integration is racism and discrimination.

6.12 Section Two – England's Response to FGM

[820] Home Office, Community Cohesion: A Report of the Independent Review Team (Government Printing Office 2001) 9.

As explained at the start of the foregoing section, it was necessary to give an overview of Britain's multicultural history in order to have a comprehensive understanding of British multiculturalism. Having understood Britain's response to multiculturalism, the present section specifically examines England's response to FGM – a by-product of cultural diversity. References to the UK as a whole will be made where needed in the discussion.

In the early 1980s, FGM came into the spotlight in England through media coverage on a number of events. On 24 July 1982, *The Times* reported the case of Bobo Traoré, a three-month old Malian girl from Paris, who died after complications from an excision; on 6 October 1982, *The Times* reported on a trial in Paris in which the defendant (the father of a Malian girl admitted to hospital with severe haemorrhaging after an excision)[821] received a one-year suspended sentence.[822] Reports also emerged that doctors were performing the operations in private clinics in London. On 10 October 1982, an article in *The Observer* revealed a London doctor had admitted to carrying out the operation on two patients who had come from Nigeria to have it done in a private clinic.[823]

Following these events, legislation was considered. Asked if parliament would legislate against female circumcision, then Secretary of State for Social services, Lord Kennet Clarke's initial response seemed to suggest the government was reluctant to get involved in the matter, citing the largely self-regulating nature of the medical profession. He stated: -

[821] See Chapter Five 5.7 for a discussion of these excision cases.
[822] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 510.
[823] Ibid.

> I fully share the abhorrence of this practice which has been expressed by a number of representatives of the medical profession. . . Unethical practices by doctors are a matter for the General Medical Council to consider, and we have written asking the Council, what action, if any, it proposes to take. . . We shall consider urgently, in the light of its reply, whether any additional steps are needed.[824]

Prior to the sudden media coverage, some organisations in the UK had been involved in campaigning against the practice. The Anti-Slavery Society for the Protection of Human Rights (ASS) (founded in 1839), had been campaigning against female circumcision in Africa and as it emerged in Britain, the ASS opined that legislation would set an example to the rest of the world.[825] The Minority Rights Group (MRG) had identified FGM as a problem in Britain in its 1980 report entitled 'Female Circumcision, Excision and Infibulation: the facts and proposals for change' which led to the establishment of the Women's Action Group on Female Excision and Infibulation (WAGFEI) under the auspices of MRG.[826] WAGFEI would later become the present-day Foundation for Women's Health Research and Development (FORWARD) which works to eliminate violence against women – FGM being one.[827] In 1982, Lord Kennet and his wife, having read MRG's report, wrote to WAGFEI offering their support. According to Sochart, Lord Kennet's actions promoting the aims of WAGFEI eventually led to female circumcision becoming part of the British political agenda.[828]

[824] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 511.
[825] Ibid 509.
[826] Ibid.
[827] FORWARD, 'About Us' https://www.forwarduk.org.uk/about-us/ accessed 14 November 2022.
[828] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 509.

6.13 FGM Legislation

By January 1983, Lord Kennet was preparing a draft Bill and sought advice from all concerned parties: the Department of Health and Social Security (DHSS), Royal College of Obstetricians and Gynaecologists (RCOG), British Medical Association (BMA) Royal College of Nurses, Somali Women's Association (SWA), MRG and WAGFEI.[829] He introduced the Bill in Parliament on 2 March 1983 a day before BBC2 aired a documentary called 'Female Circumcision', having learnt earlier that it would be aired. He used the press conference announcing the Bill to also draw attention to the BBC programme which would in turn reinforce his position on the necessity of legislation.[830] The documentary was almost dropped on the day of transmission on "grounds of delicacy" as showing female genitalia on BBC TV was banned.[831] The haunting documentary evoked public concern and on 16 March 1983 an Early Day Motion was signed by 89 members in the House of Commons congratulating the BBC on the documentary and calling on the government to legislate against the practice.[832] This would eventually result in the Prohibition of Female Circumcision Act (1985 Act), which came into effect in July 1985 and applied to the whole of the UK.

Though the Prohibition of Female Circumcision Bill was presented in parliament in 1983, there was a significant delay in passing the Act mainly attributed to disagreements over the

[829] Ibid 511.
[830] Ibid 512.
[831] Roger Mills, 'Pioneer in the fight against FGM' *The Guardian* (27 July 2014) https://www.theguardian.com/society/2014/jul/27/pioneer-in-fight-against-fgm accessed 13 September 2022.
[832] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 512.

provisions to do with ‘mental health’ and ‘custom or ritual’ and their interrelation.[833] The original Bill as presented by Lord Kennet, prohibited the operation of female circumcision except where it was necessary for the physical health of the patient. It recognised that 8,000 or 9,000 genital operations were done each year typically for cancerous, pre-cancerous and other conditions[834], thus legislation needed “to be defined tightly enough to allow those operations to be carried out legally”.[835] Lord Glenarthur, argued however, that the enactment presented a “central and most delicate problem,” which was “the distinction between the practices which go by the name of female circumcision and operations which are legitimate and necessary to a woman's health”.[836] The distinction sought was apparently between genital operations necessary for the physical health of women/girls and those of a cosmetic nature, the latter which would not be permitted within the original terms of the legislation.

The problem that the government sought to prevent was – in the words of Lord Glenarthur - a situation in which “a girl or a woman, otherwise perfectly healthy, becomes anxious and depressed about the shape or size of her external genitalia. This distress—which may become very acute and could lead to mental illness—can only be relieved by surgery, such surgery—colloquially referred to as "trimming"—cannot be said to be necessary for physical health. It is from the woman's actual or potential mental illness that the need for it arises”.[837] There was therefore need to amend the Bill to allow genital operations which were necessary for the physical or mental health of a person, but in determining such necessity, it was contended

[833] Moira Dustin, ‘Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies’ (2010) 17(1) European Journal of Women’s Studies 14.
[834] HL Deb 21 April 1983, vol 441, col 676.
[835] Moira Dustin, ‘Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies’ (2010) 17(1) European Journal of Women’s Studies 14.
[836] HL Deb 23 January 1984, vol 447, col 75.
[837] HL Deb 23 January 1984, vol 447, col 75.

that no account should be taken of beliefs based on ritual or custom.[838] Lord Glenarthur firmly asserted that the lawfulness of the 'trimming' operations (estimated at 10 or 20 a year) had never been called into question nor any evidence of abuses produced, and the matter of legislating on it only arose because it was necessary to distinguish it from the "quite separate issue of female circumcision".[839]

In essence, the effect of the amendment would be that a girl or woman who suffered psychological harm caused by rejection/ostracism (or fear of rejection) from her family or community for not undergoing FGM, could not rely on this as justification for the procedure. While FGM in all its various forms is undoubtedly physically and mentally harmful, distinguishing between the mental health of girls and women on the basis of 'ritual and custom' is arguably, indirectly discriminatory and presents a double standard by privileging what is acceptable in British culture and condemning what is acceptable in some minority cultures. The Commission for Racial Equality stated as much in their opinion of the Bill: -

> However well-intentioned in seeking to avoid any circumvention of the Bill's purpose, Clause 2(2) could be indirectly discriminatory in effect. A doctor, when assessing mental health as justifying the performance of an otherwise prohibited operation, will normally base his judgment on the patient's state of mind as he finds it. To suggest that some reasons for that state of mind may be acceptable and others, broadly

[838] Moira Dustin, 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies' (2010) 17(1) European Journal of Women's Studies 14.
[839] HL Deb 23 January 1984, vol 447, col 88.

> confined to those which might affect persons of African origin or descent, are not, is in our view, discriminatory and therefore to be avoided.[840]

The London Black Women's Health Action Project (LWHAF) an action group of SWA and present day Black Women's Health and Family Support Group (BWHAFS) opposed the clause as being racialised.[841] LWHAF also argued that in order for any legislation to be effective, it would need to be accompanied by provisions for community health education and counselling programmes.[842] Contrarily, WAGFEI supported the Bill. According to Sochart, the reason for NGOs' differing support of the legislation came down to a difference in objectives. LWHAF being a community-based action group promoting African women's welfare in Britain, was unprepared to compromise over what it perceived to be discriminatory legislation targeting Somalian women.[843] LWHAF felt that the effect of the law would be to reinforce the clandestine nature of FGM, entrenching it more deeply within the strata of cultural norms of the practising communities, whilst "transforming otherwise protective parents into potential criminals".[844] On the other hand, WAGFEI was politically experienced through its involvement with MRG and ASS and approached FGM as an international issue with the long-term objective of worldwide eradication.[845] It was therefore prepared to compromise for the attainment of this higher objective, as it felt that criminalising FGM in the UK, would have the effect of

[840] HL Deb 23 January 1984, vol 447, col 78.
[841] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 521.
[842] Ibid 521.
[843] Ibid 525.
[844] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35 (4) Politics & Society 496.
[845] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 525.

legitimising the anti-FGM activism work that was being undertaken in Africa by grass-roots women's organisations, thus ultimately contributing to the cause of global eradication.[846]

Western nations have indeed faced criticism from cultural relativists and feminists of colour for condemning FGM yet allowing female genital cosmetic surgeries.[847] It should be noted, however, that whilst there are some legitimate comparisons between these two practices, FGM, unlike genital cosmetic surgeries, is performed solely on children thus rigorous safeguarding measures for child protection is necessary and justified. Presumably, there is also the point that cosmetic surgeries are not intended to, and if performed competently do not, impair sexual function. That said, the government's firm insistence on accommodating within the law the 'trimming' operations while precluding similar operations on grounds of ritual and custom appears to be generally in tune with the theme identified in the foregoing section, that British cultural norms override the demands of minority groups in spite of competing claims.

Dustin notes that exerted pressure from medical bodies to block any law that would hinder them carrying out the 'trimming' operations was also behind the government's determination to have an amendment. She references a letter from Rustam Feroze, then president of RCOG, in which he claimed Lord Kennet's original Bill "'would have interfered with normal medical practice to a degree unknown in this country' and accused him of failing to distinguish between 'ritual circumcision' of young girls and 'plastic surgery on adult women who are

[846] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 525.
[847] See Henriette D Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 339-348; Arianne Shahvisi, 'FGM vs female "cosmetic" surgeries: why do they continue to be treated separately?' (2021) IJIR.

seeking help for themselves'".[848] Nonetheless, BMA and RCOG had great difficulty in explaining the difference between "female circumcision for 'customary' reasons and 'trimming' operations on girls and women under the misapprehension that they had deformed genitalia".[849] Lord Glenarthur admitted this: -

> The problem is that while the distinction between this legitimate surgery and the traditional practice of female circumcision is quite clear in common-sense terms, there is no precise anatomical definition which would admit one and not the other. That is why we need the provision for surgery on mental health grounds together with the qualification contained in subsection (2).[850]

After the protracted debates, the amendment was agreed, and the final wording of the legislation was as follows (it shall be an offence to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris except where):

> 2(1)(a) it is necessary for the physical or mental health of the person on whom it is performed and is performed by a registered medical practitioner.

[and]

> 2(2) In determining for the purposes of this section whether an action is necessary for the mental health of a person, no account shall be taken of the effect on that person of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.[851]

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[848] Moira Dustin, 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies' (2010) 17(1) European Journal of Women's Studies 14.
[849] Ibid 15.
[850] HL Deb 23 January 1984, vol 447, col 88.
[851] Prohibition of Female Circumcision Act 1985 s 2.

6.14 A lack of Prosecutions

In the years following the 1985 Act, no cases were prosecuted under this legislation. FGM was identified as child abuse in government guidance in 1989, but no mandatory guidelines were issued to professional bodies and the majority of local authorities did not develop specific policies and procedures to deal with incidences of FGM; there was also little concerted effort to reach practising communities.[852] Decades later, even up to the repealing of the 1985 Act in 2003, there were still no prosecutions.

There has been growing demand in recent years for prosecutions with the sense that FGM has been an unpunished crime. Berer has argued contrarily, that FGM statistics are unsupported by evidence and that the demand for prosecutions is "based on exaggerated estimates of how many girls in the UK are thought to be at risk, which in turn is based on the number of women living in the UK who have reported having FGM as children in other countries".[853] His assertion appears to be founded based on a government funded study in 2015, to establish the scale of FGM in England.[854] The study arrived at its estimated figures by "examining data on the incidence of FGM in countries in which it traditionally occurs and then projecting incidence rates onto the relevant immigrant communities in England and Wales, the size of which were derived from the 2011 Census".[855] The tone taken by politicians on FGM is also plainly

[852] Moira Dustin, 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies' (2010) 17(1) European Journal of Women's Studies 16.
[853] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 259.
[854] City University, Prevalence of Female Genital Mutilation in England and Wales: National and local estimates (City University London 2015).
[855] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 13.

hyperbolic and sensational. Keith Vaz, former Home Affairs Select Committee chairman stated in 2015: "Young girls are being mutilated every hour of every day. This is deplorable. This barbaric crime which is committed daily on such a huge scale across the UK cannot continue to go unpunished".[856]

Some doctors do not believe that FGM is taking place on the scale politicians have alleged; Dr Catherine White, clinical director at St Mary's Sexual Assault Referral Centre in Manchester, one of three specialist centres in the UK where children are examined for FGM, said: "We're just not seeing the numbers that we would have thought we would see, given the demographics that we cover now".[857]

Though it is arguably true that numbers are exaggerated, we can only rely on statistics given the extremely secretive nature of FGM. It is nonetheless a reality that the practice does happen in England, albeit in comparably smaller numbers than is estimated. Moreover, though the argument may not be evidentially strong, it is reasonable to conclude that if France prosecuted numerous excision cases in the 1980-90s, the UK, also a country of migration, would very likely have had the same problem to an unknown degree. It is important to note too that while FGM still persists globally, several African countries have now criminalised it, thus there has been decline in many parts of the continent over last thirty years,[858] it is

[856] Dr Faye Kirkland, 'Families left devastated by false claims of FGM in girls' *BBC News* (5 September 2017) https://www.bbc.co.uk/news/uk-41150621 accessed 19 September 2022.
[857] Ibid.
[858] 28 Too Many, 'Female Genital Mutilation country profiles' https://www.28toomany.org/ accessed 19 September 2022.

therefore "problematic to assume that the prevalence of FGM in practising countries was necessarily mirrored in the diaspora from those countries".[859]

According to Dustin, the lack of prosecutions was because legislation was not bolstered with simultaneous awareness-raising programmes in practising communities, as well as comprehensive guidelines for concerned professionals, moreover, "a loophole in the law allowed parents to take their children overseas to be circumcised".[860] In 2000, recommendations from an All Party Parliamentary Group that had carried out a global survey and held parliamentary hearings on FGM, became the catalyst to fresh FGM legislation.[861]

In 2003, the Female Genital Mutilation Act (2003 Act) repealed the 1985 Act. The 2003 Act increased the maximum prison sentence from 5 years to 14 years, made it an offence to assist a girl to mutilate her own genitalia and made it illegal to take a resident of the UK overseas for the procedure.[862] But as with the original legislation, the 2003 Act did not lead to prosecutions. According to Burrage, one of the reasons for this failure was "organisational buck-passing" whereby the responsibility for upholding the law was seen as someone else's.[863] Dustin suggests that part of the reason for the reluctance in implementing the law is due to uncertainty as to whether FGM is a health, children's, violence against women or human rights issue.[864]

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[859] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 15.
[860] Moira Dustin, 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies' (2010) 17(1) European Journal of Women's Studies 16.
[861] Ibid.
[862] Female Genital Mutilation Act 2003 s 2, 3, 4 and 5.
[863] Hilary Burrage, *Eradicating female genital mutilation: A UK perspective* (Ashgate Publishing 2015) 154.
[864] Moira Dustin, 'Female Genital Mutilation/Cutting in the UK: Challenging the Inconsistencies' (2010) 17(1) European Journal of Women's Studies 18.

In 2015, the Serious Crime Act amended the 2003 Act to include: an offence of failing to protect a girl from the risk of FGM; FGM protection orders; lifelong anonymity for victims; a mandatory reporting duty for professionals in regulated professions; as well as replacing "permanent" UK national /resident with the word "habitual" to extend to those on work or student visas.[865]

6.15 The Four Cases Prosecuted

The first criminal case to be brought under the 2003 Act was in 2014. It involved a doctor of South Asian background, Dr Dhanuson Dharmasena, who handled an emergency delivery in 2012. His patient had been infibulated (Type III) at the age of 6 before coming to the UK as a refugee. After getting married in 2010, she had difficulty having sex as the opening of her vagina was too small to penetrate. Her GP referred her to a specialist clinic in London and at her own request she was de-infibulated in 2011. Though she had healed well, it was discovered during the delivery that scar tissue from the de-infibulation was covering the urethra and her bladder needed to be emptied to ease the baby's passage. Dr Dharmasena therefore made a small cut on the scar tissue which exposed the urethra and emptied the bladder, after which the baby was born safely. Afterwards, as the scar tissue was still bleeding, he put in a stitch and the bleeding stopped.[866] For this, he was accused of re-infibulating her

[865] Serious Crime Act 2015 s 70-75.
[866] Marge Berer, 'Acquittals in the FGM case in London: justice was done and was seen to be done, but what now?' (10 February 2015) https://bererblog.wordpress.com/2015/02/10/acquittals-in-the-fgm-case-in-london-justice-was-done-and-was-seen-to-be-done-but-what-now/ accessed 19 September 2022.

contrary to section 1(1) of the 2003 Act. He was acquitted by a jury after a 30 minute deliberation in January 2015.[867]

Dr Katrina Erskine, consultant in obstetrics and gynaecology at the Homerton Hospital in London, criticised the fact that Dr Dharmasena had been prosecuted in the first place, arguing the CPS was responding to public pressure over the lack of FGM prosecutions.[868] Similarly, Berer affirmed that the CPS was "desperate to find a case with enough evidence that could end in a conviction, [as] the political pressure on them was enormous", but she also opined that it was not an accident that the first criminal prosecution involved an immigrant and person of colour, arguing that anti-immigration politics were at play.[869] She also questioned why it was that the hospital was not put on trial, yet even the judge admitted that Dr Dharmasena "had been badly let down by a number of systematic failures which were no fault of his own at the Whittington hospital".[870]

To further illustrate the general climate as regards the pressure to prosecute, in early 2014, as part of a public campaign against FGM, the government mobilised the police and UK border officials at the airports to warn passengers headed to "high risk" countries that FGM was

[867] Sandra Laville, 'Doctor found not guilty of FGM on patient at London hospital' *The Guardian* (4 February 2015) https://www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena accessed 19 September 2022.
[868] Sandra Laville, 'Decision to prosecute doctor for FGM 'left me with no faith in British justice' *The Guardian* (4 February 2015), https://www.theguardian.com/society/2015/feb/04/prosecuting-dr-dhanuson-dharmasena-female-genital-mutilation-mistake-consultant accessed 19 September 2022.
[869] Marge Berer, 'Acquittals in the FGM case in London: justice was done and was seen to be done, but what now?' (10 February 2015) https://bererblog.wordpress.com/2015/02/10/acquittals-in-the-fgm-case-in-london-justice-was-done-and-was-seen-to-be-done-but-what-now/ accessed 19 September 2022.
[870] Sandra Laville, 'Doctor found not guilty of FGM on patient at London hospital' *The Guardian* (4 February 2015) https://www.theguardian.com/society/2015/feb/04/doctor-not-guilty-fgm-dhanuson-dharmasena accessed 19 September 2022.

illegal, and to intercept families that may have taken their daughters abroad for FGM.[871] The officers were told to look out for girls dressed as "little divas"; apparently, the girl would look like "a mini diva with heels on her shoes, make-up, and wearing beads. Often they are wearing blue make-up. The beads are very symbolic and are put on after the celebration to show the initiation has taken place".[872] This kind of identification is dubious to say the least and an open avenue for racial profiling and discrimination. Even if the goal is to protect girls, the manner in which it is achieved should be well thought out, lest it victimizes and harms the very ones it purports to protect.

Berer identified three sets of arrests between 2014 and 2015 that resulted from these government campaigns, that never came to trial, and which were, according to her, indicative of racial profiling and discrimination, although on the limited evidence available, it is difficult to be certain.

> In 2014, a 72-year-old man was arrested at Heathrow Airport after arriving with an 11-year-old girl on a flight from Kampala. Specialist officers took the girl, a UK national, into the care of social services. No further information was published.
>
> A 40-year-old woman was arrested in East London under Section 2, FGM Act 2003, for 'aiding, abetting, counselling or procuring a girl to carry out FGM on herself'. Both she

[871] GOV.UK, 'FGM: Border Force targets 'high risk' flights at Heathrow to stop female genital mutilation' (9 May 2014) https://www.gov.uk/government/news/fgm-border-force-targets-high-risk-flights-at-heathrow-to-stop-female-genital-mutilation accessed 19 September 2022.

[872] Sandra Laville, 'Anti-FGM campaign at UK airports seeks to stop mutilation of girls' *The Guardian* (9 May 2014) https://www.theguardian.com/society/2014/may/09/anti-fgm-airports-heathrow-met-action-nigeria-sierra-leone accessed 19 September 2022.

and the girl were taken into custody in July 2014. No further information was published.

A 42-year-old Zimbabwean-born British woman was arrested as she was about to board a flight to Ghana at Heathrow. Her daughter, aged 8, was taken into care after her arrest. This was reported in February 2015. No further action was taken. She was later released and reunited with her daughter.[873]

In 2015, FGM was the subject of proceedings in a children's case. *Re B and G* concerned applications for care orders for two children; a boy (B) and a girl (G), who were temporarily placed in foster care after their mother apparently abandoned the girl in the street.[874] Concerns of FGM were initially raised when blood was found in the girl's nappy by staff at her nursery, but this was dismissed after she was examined by two doctors who concluded there was no evidence of FGM.[875] Later, the foster carer reported that G had "irregular genitalia" and questions as to whether G had been subjected to FGM arose again.[876] The court heard testimonies from three expert witnesses who had jointly concluded that if the girl had undergone FGM, it "took the form of a scar adjacent to the left clitoral hood", thus falling under WHO Type IV.[877] Justice Munby was dissatisfied by the expert testimonies finding that G had not been subjected to FGM and she was not at risk of being subjected to FGM in the future. Justice Munby is said to have "muddied the waters by conflating male circumcision with female circumcision".[878] In his judgment, he stated that in his view some forms of Type

[873] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 261.
[874] *Re B and G* (Children) (No 2) [2015] EWFC 3 [1].
[875] Ibid [13].
[876] Ibid [14].
[877] Ibid [20].
[878] Ruari D McAlister, 'Commentary: A Dangerous Muddying of the Waters?' (2016) 24 Medical Law Review 261.

IV such as pricking, and piercing were much less invasive than male circumcision.[879] He argued, "… if FGM Type IV amounts to significant harm, as in my judgment it does, then the same must be so of male circumcision".[880] However, although he felt that male circumcision did amount to significant harm, under the Children Act 1989 a care order could only be warranted if the significant harm fell below the reasonable expectations of a parent.[881]

The second criminal case to be tried was in 2018 in Bristol and involved a Somali taxi driver. It was alleged that in 2016, while driving Mr Ullah, the accused told him that in his Somali culture girls have "the big cut" but his then 6-year-old daughter just had "the small cut".[882] Mr Ullah, an anti-FGM campaigner, informed the police of the conversation and a medical examination found the girl to have a small lesion.[883] The father was charged with child cruelty under section 1(1) of the Children and Young Persons Act 1933.[884] It is not clear why he was not charged under the FGM Act. Gaffney-Rhys suggests it might be that the procedure in question did not fall within the scope of section 1(1) of the 2003 Act,[885] however, that depends on what encompasses "otherwise mutilates" as per the Act. The examining doctor said the lesion (classified as Type IV) could have been caused if "she had been pricked or possibly had a small burn to her clitoris using a hot, sharp object".[886] Two other experts who examined photographs from the examination, said they "could not confirm FGM had taken place, but

[879] *Re B and G* (Children) (No 2) [2015] EWFC 3 [60].
[880] Ibid [69].
[881] Ibid [73].
[882] BBC News, 'Father denies cruelty charge for 'allowing' daughter's FGM' (20 February 2018) https://www.bbc.co.uk/news/uk-england-bristol-43117756 accessed 19 September 2022.
[883] Ibid.
[884] Ruth Gaffney-Rhys, 'Recent cases relating to female genital mutilation' (2018) Fam Law 1158.
[885] Ibid.
[886] BBC News, 'Girl's 'FGM examination revealed scar', Bristol Crown Court hears' (20 February 2018) https://www.bbc.co.uk/news/uk-england-bristol-43131465 accessed 19 September 2022.

also could not exclude it".[887] Judge Lambert instructed the jury to find the defendant not guilty, describing the medical evidence as "wholly inconclusive at its highest"; according to the judge, the prosecution did not provide evidence "as to when or how any alleged mutilation is said to have taken place".[888] Gaffney-Rhys, seemingly unconvinced of the father's innocence, argues that the failure in the case demonstrates the difficulties in securing a conviction in Type IV cases where the victims cannot give evidence, and that "the acquittal may send a message that the less serious forms of FGM will be tolerated".[889]

It is noteworthy that a year after this case, the Bristol and Cardiff universities published a joint report on FGM safeguarding based on qualitative research, which found that "perceived power imbalances were seen to underpin the experiences of FGM safeguarding of Bristol Somalis. An important way in which this power imbalance was enacted was through drawing attention to, or failing to appropriately engage with, inequalities in socioeconomic position or class, and English language ability".[890] Brown and Porter similarly note that the Somali community have felt targeted despite being the community leading in engagement and campaign work during the early stages of the Tackling Female Genital Mutilation Initiative (TFGMI) launched in 2010.[891] According to Berer, the aforementioned report is likely the first of its kind in addressing stigmatisation resulting from FGM safeguarding.[892] There is currently no public or published response to the report by the CPS or the local authority in Bristol.

[887] Ibid.
[888] BBC News, 'Bristol FGM case against father dropped' (22 February 2018) https://www.bbc.co.uk/news/uk-england-bristol-43153529 accessed 19 September 2022.
[889] Ruth Gaffney-Rhys, 'Recent cases relating to female genital mutilation' (2018) Fam Law 1158.
[890] S Karlsen et al, When Safeguarding Becomes Stigmatising: A Report on the Experiences of Somali Families in Bristol with Anti-FGM Safeguarding Policies (University of Bristol 2019).
[891] Eleanor Brown and Chelsey Porter, 'The Tackling FGM Initiative: Evaluation of the Second Phase (2013-2016)' (2016) Options 14.
[892] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 264.

However, in its Multi-Agency Statutory Guidance on FGM,[893] the government provided comprehensive guidelines and resources on communicating about FGM, which if implemented can mitigate the challenges that arise from safeguarding.

Following the Bristol case, the third criminal case was heard in March 2018 at the Old Bailey in London, "involving a West-African solicitor who was accused of arranging FGM for his daughter on two occasions between 2010 and 2013".[894] The girl gave evidence at 16 that she had been 9 or 10 when the procedures were done, and a medical expert confirmed that her genitals had been cut, but could not determine precisely when this was done.[895] "It was alleged that the mutilation was done as punishment for the girl stealing money", however, defendant's counsel pointed out that FGM was "predominantly perpetrated . . . for reasons including purification, honour and social acceptance", but not for punishment.[896] Counsel also cited family tensions after the parents separated suggesting that the mother may have influenced the daughter to lie.[897] The jury acquitted the defendant on "two counts under FGM, and alternative counts of wounding with intent and child cruelty".[898] In response to the acquittal, the head of the National FGM Centre said: "While we respect the decision of the jury, it is important to remember that someone did carry out female genital mutilation on the victim almost a decade ago … it is vital support is in place for her for as long as she needs it".[899]

[893] HM Government, Multi-agency statutory guidance on female genital mutilation (July 2020).
[894] Ruth Gaffney-Rhys, 'Recent cases relating to female genital mutilation' (2018) Fam Law 1159.
[895] Ibid.
[896] Ibid.
[897] Ibid.
[898] Ibid.
[899] Alexandra Topping, 'UK solicitor cleared of forcing daughter to undergo FGM' *The Guardian* (22 March 2018) https://www.theguardian.com/society/2018/mar/22/uk-solicitor-acquited-forcing-daughter-fgm-female-genital-mutilation accessed 19 September 2022.

The acquittal is difficult to explain as no other perpetrator was identified and it was both the girl and doctor's evidence that she was cut. No further information is available on the case.

The fourth criminal case (to date) was heard in 2019, leading to the first ever FGM conviction the UK. *R v N* involved African parents of a 3 year-old girl and 8 year-old boy.[900] They were accused of subjecting their daughter to FGM over the 2017 summer bank holiday.[901] Berer who attended the trial provided a detailed account of the facts in her article, which are summarised as below.[902] It was alleged that the little girl had cut her genitals after she had fallen on the open door of a kitchen cupboard, having climbed up the kitchen counter for a biscuit.[903] "The cupboard door's upper edge was a U-shape, with narrow metal-coated edges", which the mother described as "sharp metal edges".[904] The mother called emergency services but they ended up taking the girl to hospital in a taxi as there was a shortage of ambulances.[905] The girl was examined by a doctor; her labia minora to the right side was missing, the labia minora to the left side was also cut but the tissue was still attached by a sliver of skin, and there was a small cut in the hood of the clitoris with a clot formed beneath it.[906] She was later examined by three consultants, two of whom ran an FGM clinic, and they indicated she had undergone Type II FGM[907]; while they all agreed that that the damage could have been caused by her falling on the cupboard door, none of them thought that was the case; cuts in three

[900] *R v N* (Female Genital Mutilation) [2019] 3 WLUK 161.
[901] Katy Clifton, 'Mother of three-year-old girl becomes first person in UK to be found guilty of female genital mutilation' *Evening Standard* (1 February 2019) https://www.standard.co.uk/news/crime/mother-of-threeyearold-girl-becomes-first-person-in-uk-to-be-found-guilty-of-female-genital-mutilation-a4055536.html accessed 19 September 2022.
[902] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 265-268.
[903] Ibid 266.
[904] Ibid.
[905] Ibid.
[906] *R v N* (Female Genital Mutilation) [2019] 3 WLUK 161.
[907] Ibid.

different places from one fall were highly unlikely and an injury from the cupboard would have caused bruising.[908] The parents were arrested, though it was not until a year later that they were not charged with FGM; the boy was taken into emergency foster care and when the girl was discharged she was taken to the same foster home.[909]

In a recorded police interview, the little girl said that she had been cut by a "witch-lady".[910] Though the police "refused to rule out the involvement of a third party", they acknowledged that no evidence was found suggesting "that anyone else had been in the flat that day".[911] The mother told the court that she had not heard of FGM before as it was not practiced in her community and that she herself was not cut – she offered to be examined to prove this, and the father also said he was not from a practising community.[912] Witchcraft and spells were referenced in the trial after the police found in the mother's flat: "bizarre spells inside 40 frozen limes and two ox tongues with screws embedded in them aimed at silencing police, social workers, officers and lawyers in the case".[913] The mother's counsel asked that "anything related to witchcraft to be declared inadmissible", but the judge refused the application, albeit stressing that "the mother's beliefs and practices should not be taken as evidence of guilt".[914] The mother denied practising witchcraft but acknowledged sometimes using spells "to ward

[908] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 267.
[909] Ibid 266.
[910] *R v N* (Female Genital Mutilation) [2019] 3 WLUK 161.
[911] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 267.
[912] Ibid.
[913] Katy Clifton, 'Mother of three-year-old girl becomes first person in UK to be found guilty of female genital mutilation' *Evening Standard* (1 February 2019) https://www.standard.co.uk/news/crime/mother-of-threeyearold-girl-becomes-first-person-in-uk-to-be-found-guilty-of-female-genital-mutilation-a4055536.html accessed 19 September 2022.
[914] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 268-9.

off danger to herself and her family and to try to make trouble go away".[915] The prosecution admitted in evidence a letter from a witness "which claimed FGM and witchcraft in Africa are related"; the mother's counsel adduced counter-evidence that "there was no connection between FGM and witchcraft".[916] The judge "directed the jury that they needed to decide whether the children's evidence was reliable or not"; their evidence and "the opinions of the medical experts were the only basis on which to find the mother guilty".[917] The jury found the mother guilty of FGM and the father was acquitted. The judge sentenced her to 11 years in prison.[918]

What is striking about the foregoing case, in comparison to France, is the mode and length of the sentence. While France has had many more convictions, all of the sentences handed to parents, except one, were suspended. Of course (as discussed) the suspended sentences were criticised as lenient, and not deterring enough. Despite the severity of the offence in the present case and what the judge referred to as "serious aggravating features", it is plausible that the judge intended to make an example of the case to deter future offenders.[919] Moreover, this was the first ever conviction since the law was passed in 1985, therefore a severe sentence was, arguably, quite welcome.

While it is difficult to make concrete conclusions on FGM prosecution in England based on only four cases, certain pertinent issues arise. In some of the cases discussed, and arguably

[915] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 269.
[916] Ibid.
[917] Ibid.
[918] *R v N* (Female Genital Mutilation) [2019] 3 WLUK 161.
[919] Ibid.

many more that did not reach the courts, lack of evidence or weak evidence is apparent. The matter of evidence itself is complex since it intertwines with several broader issues. An obvious impediment is the failure of victims coming forward but given that most are children this is unsurprising. Even if it were possible (age-wise) for them to report, victims may fear the repercussions, as the perpetrators will most likely be their parents. To mitigate this challenge, the 2003 Act stipulated a mandatory reporting duty for those in regulated professions such healthcare, education, and social services, yet here too complexities abound. It was reported that some healthcare professionals raised concern that reporting breached patient confidentiality, which might result in women being less likely to speak openly with doctors, while others simply did not accept that it was their responsibility to report and "franchised it out to some community groups".[920] Another impediment to reporting has to do with 'cultural sensitivity', whereby frontline practitioners and agencies are concerned about being seen as racist.[921]

6.16 FGM Protection Orders

Although there has been little success with criminal prosecution, there has been significant success with civil injunctions – the FGM protection orders. The purpose of a FGMPO as is stipulated in Part 1 of Schedule 2 to the 2003 Act, is "protecting a girl against the commission of a genital mutilation offence" or "protecting a girl against whom any such offence has been

[920] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 42.
[921] Home Affairs Committee, *Written Evidence Female Genital Mutilation* (HC 2014) para 19.

committed".[922] Since their introduction in July 2015, there have been a total of 539 applications for FGM protection orders and 764 orders made up to the end of June 2022.[923] It is not possible to mention them all but two will be discussed below.

The case in *Re X* involved a British woman, M, (married to an Egyptian man), who gave birth to their daughter in the UK in 2016 while the father, F, remained in Egypt.[924] M had planned to return to Egypt with X but she voiced concern to her Health Visitor about FGM taking place in Egypt.[925] Social Services were alerted and an FGMPO application was made. Based on expert evidence on the prevalence of FGM in Egypt[926], Justice Russell concluded that X would be "at very substantial risk of FGM should she travel to Egypt with her mother, who would be vulnerable and isolated, unable to understand what was being said or discussed around her and largely, if not wholly, unequipped to prevent FGM taking place if the family decided that it should".[927] The judge made an FGMPO that would remain in force until the 22 August 2032 (until X's 16th birthday) forbidding M from travelling outside of the UK with X to prevent onward travel to Egypt.[928] X's passport would remain with the court and be destroyed after its expiration and M was forbidden from applying for a new passport or any travel documents on behalf of X, which order "extended to all other persons including F".[929] The judge further

[922] Female Genital Mutilation Act 2003, schedule 2 part 1 (1)(a)(b).
[923] GOV.UK, 'Family Court Statistics Quarterly: April to June 2022' (Ministry of Justice, 12 October 2022) https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2019 accessed 9 December 2022.
[924] *Re X* (A Child) (Female Genital Mutilation Protection Order) (Restrictions on Travel) [2017] [1].
[925] Ibid [10].
[926] Egypt has the fourth highest incidence of FGM in the world – 91% prevalence.
[927] *Re X* (A Child) (Female Genital Mutilation Protection Order) (Restrictions on Travel) [2017] [78].
[928] Ibid [81].
[929] Ibid [82].

ordered that "a copy of the FGMPO is to be served on the relevant unit within the Home Office, Her Majesty's Passport Office, the FCO and the Egyptian Embassy".[930]

In *A Local Authority v M and N* the local authority filed an application for an FGMPO to prevent N, an infant, from travelling to Sudan with her mother, M.[931] M, a British citizen born in Sudan had applied for asylum and been resident in the UK for over 10 years; the father, F, also Sudanese was unsuccessful in his application for asylum, but had been living with M and their children in the UK.[932] In 2017, the family visited Sudan while M was heavily pregnant with N, and F decided that he wanted the family to remain permanently in Sudan, which decision M was "passionately resistant to".[933] M, managed to convince F to let her return for the birth of their daughter so she could benefit from the medical care in the UK, having suffered difficulties in previous deliveries.[934] On her return, M complained to social services that she was scared her husband's family wanted N to undergo FGM and "would force her husband to permit it; she confirmed that she had been herself a victim of FGM in the Sudan".[935] However, in the period leading up to the hearing, M "significantly modified her earlier evidence" seeking to "minimise the extent of the risk [of FGM] … in her eagerness to return to her sons".[936] Justice Hayden, while accepting that M was wholly against FGM and her resolve to protect N, nonetheless determined there was a real risk to N based on F's family's acceptance of FGM and the significant FGM incidence rate in Sudan.[937] The judge also determined that the "risk

[930] *Re X* (A Child) (Female Genital Mutilation Protection Order) (Restrictions on Travel) [2017] [82].
[931] *A Local Authority v M and N* (Female Genital Mutilation Protection Order - FGMPO) [2018] EWHC 870 (Fam) [1].
[932] Ibid [2].
[933] Ibid [3].
[934] Ibid [5].
[935] Ibid [6].
[936] Ibid [15].
[937] Ibid [55].

to N had to be considered in the context of M's ability to extricate herself and her children from Sudan in the future".[938] He argued that N would be immediately at risk should M be "unable to negotiate N's removal" and that there was a high possibility of this given the family dynamics.[939] In those circumstances, Justice Hayden determined that "the risk can logically only be regarded as high and the countervailing measures required in order to protect as substantial",[940] and he accordingly granted the FGMPO prohibiting N's removal.[941]

With the advent of FGMPOs, the law has been commended as having moved in "a more appropriate, victim-centred direction".[942] However, the use of FGMPOs has also been criticised as reactive rather than rational. Berer has argued that it is "ill-judged to be suspicious of all African/Muslim grandparents, fathers, mothers and aunties who are taking a child to another country".[943] Some charities working to eliminate FGM have said the manner in which some cases were handled have left children and their families traumatised. FORWARD said it had worked with a family where the child was placed in foster care for eight months before being examined and was found not to have undergone FGM.[944] The head of programmes at FORWARD said: "There's a knee-jerk reaction from professionals when they hear FGM. I don't know whether it's terrified or wanting to make sure something doesn't go wrong. So they

[938] *A Local Authority v M and N* (Female Genital Mutilation Protection Order - FGMPO) [2018] EWHC 870 (Fam) [55].
[939] Ibid.
[940] Ibid.
[941] Ibid [57].
[942] Ruth Gaffney-Rhys, 'From the Offences Against the Person Act 1861 to the Serious Crime Act 2015 - the development of the law relating to female genital mutilation in England and Wales' (2017) 39(4) Journal of Social Welfare and Family Law 431.
[943] Marge Berer, 'The history and role of the criminal law in anti-FGM campaigns' (2015) 23(46) Reproductive Health Matters 154.
[944] Dr Faye Kirkland, 'Families left devastated by false claims of FGM in girls' *BBC News* (5 September 2017) https://www.bbc.co.uk/news/uk-41150621 accessed 19 September 2022.

really go in too hard".[945] Whilst these claims are concerning, it is important to note that they are the anecdotal evidence of one organisation, thus more research would be welcome.

Accordingly, the question has arisen, "whether in some cases criminal law is causing more harm than the criminalised practice".[946] The Bristol/Cardiff report referenced earlier is certainly an indication that the manner in which the law has been used has negatively impacted the Somali community in Bristol. It is unquestionably a delicate balance between protecting girls from FGM and mitigating harm to families; an investigation to establish risk of FGM will be distressing despite the outcome. One might argue that trading off families in order to protect girls is justified, but that is easy to say as an outsider looking in. As discussed, although FGM is harmful, families do not do it with the intent to harm their children, rather they believe it is for their benefit. It is therefore necessary for those involved in safeguarding to have proper training so as to be mindful of these dynamics, that adequate support is given to the families, and that investigations are expedited to minimise harm. And while the law can be a useful tool in prevention, what is recommended as most effective is working with communities to create community-led initiatives to educate and change deeply held beliefs and perceptions concerning FGM.[947]

Educating children on FGM is also necessary. It was recommended to the government that Personal Social Health and Economic (PSHE) education be made compulsory in schools, including teaching children about FGM, particularly in high-prevalence areas so as to raise

[945] Dr Faye Kirkland, 'Families left devastated by false claims of FGM in girls' *BBC News* (5 September 2017) https://www.bbc.co.uk/news/uk-41150621 accessed 19 September 2022.
[946] Marge Berer, 'Prosecution of female genital mutilation in the United Kingdom: Injustice at the intersection of good public health intentions and the criminal law' (2019) 19(4) Medical Law International 279.
[947] Ibid 155.

awareness which in turn would support safeguarding efforts and reporting.[948] The government's response, however, did not support making PSHE compulsory, placing the responsibility upon individual schools to make their own judgements on what to cover in PSHE.[949]

6.17 Conclusion

To conclude, the pertinent question that arises is, what impact has British multiculturalism had on FGM in England? How has the Medium shaped current law and practice? We noted that although there has been a gradual shift from multiculturalism towards (a stricter form) of integration, there is nonetheless recognition of cultural difference and the accommodation of group rights through MCPs. Guiné and Fuentes have asserted that while the "policy framework resulted in a relatively high level of protection of group interests, a trade-off between collective and individual rights and especially women's rights seems to arise".[950] Recognition of cultural difference seems to manifest as 'cultural sensitivity' and while this is necessary in a multicultural society, undue cultural sensitivity can be an impediment to protecting the vulnerable members of the group, in this case girls and women.

We have indeed noted that cultural sensitivity has caused reluctance in frontline professionals to report FGM for fear of being called racist. One could argue that the posture of cultural

[948] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 36.
[949] Home Office, Female genital mutilation: the case for a national action plan (December 2016) 10.
[950] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 506.

sensitivity is indicative of the British reluctance to discuss matters to do with race. Not wanting to be seen as racist yet treating a black child in need of protection differently than a white child in need of protection, is racially prejudiced. There is evidence from beyond the sphere of FGM that this is a serious problem within at least some sections of the public sector e.g. the failings identified in the death of Victoria Climbié[951] and the Rochdale child sex exploitation[952] scandals. The changing and often reactionary nature of policy on multiculturalism, combined with an endemic anxiety about openly discussing racial or religious issues have placed vulnerable people in harm's way. The failings of individual medical professionals have been shaped by systemic traits within the English Medium.

The absence of any single, outstanding Human Catalyst in an English context has allowed the cultural tides within the Medium to wash where they will. There has not been a cohering force to compel a direction of travel, or to find conscious ways of striking such a balance. Issues around race, religion, female bodies and sexuality and the limits of parental action are all uncomfortable, verging on the taboo. This makes open debate unlikely to occur in the absence of a persistent campaign to keep such questions in the spotlight. The lack of such enforced direction has left FGM policy to drift with the movement of social and political currents.

[951] House of Commons: Health Committee, 'The Victoria Climbié Inquiry Report' (June 2003).
[952] House of Commons: Home Affairs Committee, 'Child sexual exploitation and the response to localised grooming' (June 2013).

CHAPTER SEVEN – THE HUMAN CATALYST & THE MEDIUM

7.1 Introduction

The preventable and agonising death of three-month-old Bobo Traoré in Paris in 1982 brought to the public's awareness the existence of a secretive and obscure practice. News broadcasts around the world shone a light not only on the injuries inflicted on the helpless baby, but also the self-centred callousness of her father, who prioritised protecting his interests over saving her life. The tragedy sparked indignation, and demands both to protect children, and hold their abusers to account. It was certainly not the first case of FGM in France; many went unreported before and since, but it was the first to create considerable media scrutiny into a custom that the wider public knew nothing about. The case made a deep impression in Britain as well as France, becoming the catalyst for action against FGM in the two nations. However, the way in which this response played out diverged, dependent upon both the prevailing Medium and influence of Human Catalysts in each setting. The foregoing chapters have delineated France and England's legislative, judicial and policy response to FGM, as well as each country's model of integration. The purpose of this chapter, therefore, is to bring together all that learned information and establish the reason(s) for the vastly divergent enforcement outcomes in France and England.

It is necessary to state as a precursor, that the French success is largely attributed to advocate Linda Weil-Curiel, whose activism and legal work has led to the prosecution of over 35 excision

cases.[953] Throughout the years, she has been highlighted in newspaper articles and journals as the lawyer fighting to protect girls against excision in France.[954] Her work in conjunction with others rendered changes in law and healthcare, both key institutions in combating FGM. Bellucci recognised Weil-Curiel's immense contribution stating, "The fact that excision cases are tried before the *Cour d'Assises* and excision trials continue to occur in France is very much due to her commitment".[955] Similarly, Winter affirms that "Weil-Curiel has been at the forefront of the French in the courts to have excision tried and sentenced as a crime".[956] Indeed, Linda Weil-Curiel's work is pivotal to the French success but it was also contingent on and driven by wider deterministic forces, that is, the French republican system, such that the individual and these underlying social forces combined, brought about the inimitable French success.

As discussed, in order to better explain these two elements, and their interaction, I have developed two terms that are representative of the individual activist and the deterministic forces: the "Human Catalyst" and the "Medium". These represent, respectively, Linda Weil-Curiel's role as the individual who prompted necessary change and action against FGM (hence the use of the term catalyst), and the subtle, but inexorable, role played by the prevailing deterministic forces constituting French republicanism. This meta-context provided the means

[953] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 99.
[954] Marlise Simons, 'Prosecutor fighting girl-mutilation' *Special to the New York Times, Late Edition* (East Coast, 23 November 1993); Alexander Dorozynski, 'French Court Rules In Female Circumcision Case' (1994) 309 British Medical Journal 831; Sophie Coignard and Christian Jelen, '*Excision le Procès des Lâcheté Françaises*' *Le Point* (Paris, 26 Mai 1997); Emilie Lanez, '*Excision Celle Qui a Rompu le Silence*' *Le Point* (Paris, 6 *Février* 1999); Adam Sage, 'The French Lawyer winning the fight against female genital mutilation' *The Times* (London, 2 April 2015).
[955] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 99.
[956] Bronwyn Winter, 'Women, the Law, and Cultural Relativism in France: The Case of Excision' (1994) 19(4) Signs Feminism and the Law 939, 944.

through which Linda Weil-Curiel's efforts acquired legitimacy and impact, and influenced the society's response to cultural diversity and thus FGM (hence the use of the term medium). In the same way, in the English context, British multiculturalism is the Medium within which the interventions against FGM operate and emanate.

These two concepts are derived from historiography[957]; the "Human Catalyst" originates from the so-called "Great Man theory"[958] an understanding of societal development being impelled by the individual activism of influential key-players; and the "Medium" is derived from the "Deterministic theory", a view that historical events are inevitably determined by pre-existing causes or predetermined sequences (the deterministic forces). The following passage encapsulates the gist of the deterministic theory: -

> These great changes seem to have come about with a certain inevitableness; there seems to have been an independent trend of events, some inexorable necessity controlling the progress of human affairs.... Examined closely, weighed and measured carefully, set in true perspective, the personal, the casual, the individual influences in history sink in significance and great cyclical forces loom up. Events come of themselves, so to speak; that is, they come so consistently and unavoidably as to rule out as causes not only physical phenomena but voluntary human action.[959]

[957] See Leonid E Grinin, 'The Role of the Individual in History' (2008) 78(1) Herald of the Russian Academy of Sciences; Ann Talbot, 'Chance and Necessity in History: EH Carr and Leon Trotsky Compared' (2009) 34(2) Historical Social Research; Chukwuemeka N Oko-Otu and Chukwudi G Chidume, 'Objectivity and the Great Man Theory in Historiography' (2021) 13(3) Cogito: Multidisciplinary Res J.

[958] The reference to the traditional label for this vision of human history should not be taken as an expression of approval or acceptance for this gendered language.

[959] Ernest Nagel, 'Determinism in History' (1960) 20(3) Philosophy and Phenomenological Research 291.

There are long running debates in historical causality as to which of these factors are the principal cause of historical events: is it one or the other or is it both? It is beyond the scope of this thesis to examine these debates in greater detail than is required for development of this thesis. The key concern here is with the merger of these historiographical approaches and legal analysis, to provide an original perspective on the debate at hand. The core question is whether the Human Catalyst or the Medium has been the principal driver of legal change. My conclusion is that there is an inseverable interdependence between them. In order to demonstrate my reasons for having arrived at this position, this chapter explores the role of the Human Catalyst and the Medium and their interconnectedness.

7.2 Contrasting Responses to FGM In England and France

In the early 1980s, grappling with this new and complex problem, both the French and UK governments considered the issue of legislation. It must be stated here that the act of passing a specific law or relying on existing criminal law provisions is not in itself indicative of success or failure. It has been argued that what actually determines if there is support for criminal law intervention, "lies with the readiness of national governments, but even more so, of practitioners to actually resort to criminal law" and this readiness "is determined by the degree of tolerance towards cultural practices that is implied in national ideas on citizenship".[960] This statement perfectly encapsulates the fundamental differences between France and England's approach to FGM.

[960] Renée Kool and Sohail Wahedi, 'Criminal Enforcement in the Area of Female Genital Mutilation in France, England and the Netherlands: A Comparative Law Perspective' (2014) 3 International Law Research 1, 8.

Favell contends that philosophies of integration are in effect "political responses designed to deal with the political, social and moral dilemmas posed by the integration of various ethnic and racial groups, particularly those of Muslim origin".[961] Guiné and Fuentes suggest that a country's philosophy of integration will be based upon their particular notions of citizenship, pluralism, ethnicity, equality, and tolerance.[962] Favell concurs in his assertion that France and Britain's differing integration philosophies are "based on contrasting understandings of core concepts such as citizenship, nationality, pluralism, autonomy, equality, public order and tolerance".[963] According to him, in France, "the dominant policy framework addresses the country's ethnic dilemmas in terms of republican ideas of *citoyenneté* and *intégration*. Britain, meanwhile, addresses similar problems in terms of the management of race relations and multiculturalism".[964]

These conceptions of citizenship and pluralism create the social/legal/cultural bedrock of society, and influence on a macro level how the society operates. They are the prevailing "deterministic forces" and what I have collectively termed the "Medium" because it is the mechanism through which society functions. In this regard, France runs on a republican Medium while England runs on a multiculturalist Medium.

[961] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 2.
[962] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 477-519.
[963] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 2.
[964] Ibid.

In the context of FGM, France's decision not to enact a specific law against the practice, is an apt reflection of its national philosophy of integration that is rooted in republican ideology which upholds "social justice and is indifferent towards any type of distinction".[965] Since French republican philosophy "stresses the virtues of civil equality", there can be no place within its conception, for particularities such as race and ethnicity "becoming defining characteristics for membership of the political community".[966] According to Jennings, French republicanism produces "a distinctive conception of what it means to be a member of the political community and the nation".[967] He references Dominique Schnapper, who asserts that "national identity is not a biological but a political fact: one is French through the practice of a language, through the learning of a culture, through the wish to participate in an economic and political life".[968] This is the gist of the *modèle français d'intégration* (the French model of integration), one enters the French community "dressed simply and solely in the garb of an individual citizen divested of all particularistic affiliations".[969] Favell explains the *modèle français d'intégration* as follows:-

> In France, the diverse interests of each become the unified collective interests of all, through their equal participation in the public sphere. Its rules are the *Code de la Nationalité*; its symbol the *carte d'identité*. Together they express the idea of *citoyenneté* as full *intégration*, and hence, *nationalité réussie* (proven and successful national membership). This represents the ideal-type end-goal, in which the new

[965] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 69.
[966] Jeremy Jennings, 'Citizenship, Republicanism and Multiculturalism in Contemporary France' (2000) 30 BJPolS 577.
[967] Ibid.
[968] Dominique Schnapper, *La France de l'intégration* (Gallimard 1991) 63.
[969] Jeremy Jennings, 'Citizenship, Republicanism and Multiculturalism in Contemporary France' (2000) 30 BJPolS 577.

> immigrant, now fully French, pursues his or her organised freedom and cultural interests entirely integrally to the French national identity, and without any externalities not captured within the overall cadre of the nation-state.[970]

Contemporary French migrant policies thus tend to demand integration (some would argue assimilation) and eschew the recognition of difference (through multicultural policies) as is the case in England.[971] In France, therefore, immigrants are considered as individuals rather than members of a minority group.[972] In this regard, the law does not recognise group rights based on cultural or geographical origins (beyond what is required in order to comply with its obligations pursuant to the ECHR and other international instruments to which it has given its assent) and passing a law essentially aimed at the African community in France would have given that distinction and recognition. Linda Weil-Curiel stated as much when she was consulted by the Ministry for Women's Affairs on the issue of legislation as below: -

> We have the penal code which forbids and punishes mutilation. Why should we need a special law, a law which would be like pointing a finger to the African people in France. Should we write a law, it would be against them, to punish them. Our system is that the law applies to everyone in the French territory. In that regard the law is universal.[973]

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[970] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 79.
[971] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour, and RA Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 61.
[972] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 100.
[973] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 90.

Weil-Curiel's comment denotes the republican tradition of universalism as she references the universality of French law, and the fact that a specific law would essentially "separate" African people from the collective French community in which there are no such distinctions. This is important to note as it is one aspect of the interconnectedness mentioned earlier between the Human Catalyst and the Medium; in this instance, it shows that the Human Catalyst is herself a product of the Medium, as she espouses the values and norms of French republicanism which are ingrained within herself as a Frenchwoman.

On the issue of legislation, the NGOs in France working for the elimination of FGM were united in their support of the decision not to legislate, as they felt a specific law would only stigmatise the concerned communities and expose their work to accusations of racism.[974] This show of unity and single-mindedness was not replicated in England, where there was division over the government's decision to enact the Prohibition of Female Circumcision Act 1985, with some NGOs criticizing the law was discriminatory against African women. England's enactment of the 1985 Act, a law effectively devised for a particular minority group, is an apt reflection of the British so-called multicultural model of integration which acknowledges and to an extent accommodates cultural difference.

As delineated in chapter five, it is quite difficult, and perhaps, inaccurate to sum up England's model of integration as simply multicultural. Throughout its extensive history, from slavery, to colonialism, to the commonwealth, to race-relations, anti-immigrant sentiment has threaded its way through all these eras, with the very clear sense that a multi-cultural Britain happened

[974] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 100.

by accident and was never in fact intended. Nonetheless, through race-relations, multiculturalism – that is, the accommodation of minority group rights – came about as a response to claims of racism and discrimination, and as an ideological and political response to ethnic diversity. Favell asserts that "the dominant doctrine of immigration control, race relations and multiculturalism is a paradigmatic example of a classic British political method".[975] As dissimilar as France and Britain are in their respective integration philosophies, Favell notes that they are objectively quite similar; "these are two nations with parallel colonial pasts, demographic conditions, and social problems very similar to one another. They are close cousins, two paradigmatically 'old' nations, with perhaps the closest family resemblance in Europe, even if they do spend much of the time denying it in the name of national distinctiveness".[976]

Indeed, on the face of their similarities, and particularly on the shared issue of cultural diversity, one might wonder why France did not follow the (more obvious) path of cultural accommodation like Britain?

The short answer, arguably, is that such a response was precluded long before the issue presented itself, going way back to the French revolution that gave birth to the particularity that is French republicanism. This French particularity will be demonstrated in greater detail in the forthcoming pages, particularly how it manifests within the context of FGM. However, a more precise answer as to why France and England's integration models are so different, lies in what integration means to each country. According to Favell, to France it is the

[975] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 200.
[976] Ibid 94.

"transforming of immigrants into full French *citoyens*", whereas to Britain, integration is a "question of managing public order and relations between majority and minority populations and allowing ethnic cultures and practices to mediate the process".[977]

In the following passage, Favell contrasts Britain's integration model with France's republican philosophy, in a manner that he concedes to be "crude" and "stereotypical", but conversely posits that as with any stereotype there is "a germ of truth in it",:-

> From the highbrow perspective of republican *citoyenneté* and *intégration*, the British way of dealing with things fails on many French philosophical counts. It is 'minoritarian', perpetuating distinctions – and hence *inégalités* – between the dominant majority and the persons of distant origin it marks out and identifies as 'ethnic minorities'. It is 'differentialist', allowing minority cultures to marginalise themselves through state-promoted multiculturalism that imposes no strict public political identity or obligations on the newcomers. It is 'race obsessed', perpetuating racism and a kind of soft apartheid through its classificatory legislation and social insistence on preserving the marker of colour in individuals' self-description. And, finally, it is 'unprincipled', allowing the pragmatism of *laissez faire* and paternalist race relations management to override the prescriptive lines that should be laid down by *droit* and *constitution*.[978]

[977] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 4.
[978] Ibid 95.

Going back to the statement on support for criminal law intervention, the following question is posed: has there been readiness by practitioners to resort to criminal law in these two states? This is indeed self-evident in France. By the time the law was passed in England in 1985, France had already prosecuted a number of excision cases, and has continued to do so since, whereas the first FGM case in England was heard in 2014 and the first conviction secured in 2019. Thus compared to England, there has been far greater support for criminal law intervention in France, manifest in the actual human and institutional interventions that led to numerous excision trials. And arguably, these interventions were made possible in the first place because of a deeply ingrained republican tradition, that affirms equality of all citizens and is indifferent to particularisms such as religious affiliation, gender, ethnicity and/or geographical origin. In other words, French republicanism was effectively a *Medium* that provided a conducive environment for these interventions to succeed.

One might question if this is in fact a realistic representation of France and not just political ideology. This question has been answered in the affirmative in chapter five which discusses the role of public education in inculcating French republicanism. Bowen refers to public schools in France as "institutions of integration centrally designed to create uniformity" and whose function is to "instruct and exemplify" what it means to be a French citizen.[979] This indeed appears to be the case, based on André Hussenet's report: *Une politique scolaire de l'intégration* (A school policy of integration) which outlines French educational ethos as follows: -

[979] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008) 21.

> To integrate is to establish a stricter interdependence between the members of society, something which implies that the *Ecole de la République* must impart to all its pupils a common knowledge, humanist values of equality, liberty, solidarity, and enable their access to rational thinking, while at the same time underlining the opening of French culture to the world … In order to achieve these objectives, we propose a single principle: the same ambition for everyone and two main orientations: the removal of inequalities and the opening of French culture to the world.[980]

Does this guarantee that France is impervious to cultural relativism? Although French republicanism precludes recognition of cultural difference, France was nevertheless susceptible to cultural relativism when excision was initially discovered within its borders. It took the resolute campaigning of Linda Weil-Curiel to change the landscape, particularly in the way excision was first received under the law. Initially, excision was treated as a misdemeanour and heard in the *Tribunal Correctionnele* which adjudicates petty offences known in the French system as '*délits'*, which may be sanctioned with less harsh punishments.[981] As Dembour observes, the fact that the *Tribunal Correctionnele* is only competent to "hear cases that can result in a sentence of up to five years imprisonment indicates that excision was not originally conceived as an offence likely to lead to a very severe sentence".[982] The reasoning behind this was that the parents were only following their

[980] André Hussenet, *Une politique scolaire de l'intégration, texte présenté au Comité interministériel à l'intégration* (Paris, Janvier 1990).

[981] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 97; Refer to chapter five for the 1979 case of Doua and 1982 case of Bobo Traoré which were tried before the *Tribunal Correctionnel.*

[982] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour and RA Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001) 62.

tradition, thus, there was no intention to harm the child.[983] Their offence, therefore, was not the mutilation of the infant, but the failure to seek medical treatment in order to save the child.[984]

Linda Weil-Curiel who joined the proceedings as *partie civile* on behalf of CAMS (Commission for the Abolition of Sexual Mutilations) in Bobo Traoré's case objected to this reasoning; she argued that custom could not take the place of the law and that excision was legally a crime of mutilation and therefore could only be brought before the *Cour d'Assises* for trial.

> I refused that what had been done to the child be treated as a misdemeanour. It could not be a misdemeanour because legally a criminal act was committed. If one cuts off the penis it's a crime because you chop off someone's organ that is functional: it is a mutilation. So why turn a blind eye when it's a baby girl's clitoris and labia that have been cut off? Moreover when the victim is a black child exposed to a cruel tradition who needs protection? So in Bobo Traoré's case before the charge of not going to hospital, the parents are guilty of mutilation or assisting with the mutilation.[985]

The recognition of a *different* culture and ensuing cultural sensitivity around the issue is apparent. We saw in chapter five through an examination of the trials that 'culture' was at loggerheads with the law, forming the defence of the accused, and even some prosecutors sought leniency for the parents on account of 'their different culture'. Excision was thus

[983] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 90; Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 111.
[984] See Bobo Traoré's case in section 5.7.
[985] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 92.

treated differently from a crime of mutilation, despite it being a mutilation that would ordinarily be heard in the highest criminal court. The Richer case sharply brings out this contrast. The Richer case of 1983 involved a white French woman who cut off her daughter's clitoris – the case had nothing to do with custom or culture. The *Cour de Cassation* held in that case that the removal of the clitoris constituted a crime of violence resulting in mutilation as defined by Article 312-3 of the Penal Code.[986] Linda Weil-Curiel and organisations acting as *partie civiles* in excision cases argued that the Richer case constituted a precedent to be followed in cases involving Africans, without distinction as to ethnicity as this would be discriminatory and leave girls of African origin unprotected.[987] The argument that the French state ought to protect black and white children *equally,* was a powerful and resonating argument to make in a jurisdiction that fiercely emphasizes the equality of all and rejects social distinctions.

Subsequent cases were brought under article 312 of the Penal Code before the *Cour d'Assises* which has jurisdiction over offences that may be sanctioned with the harshest punishments – a crucial shift in the treatment of excision cases.[988] Bellucci suggests that concurrent with Linda Weil-Curiel's efforts, the change was spurred on by a 'ripe' atmosphere as it were, given France's particular model of integration and because there was growing international attention to traditional practices that were detrimental to girls and women.[989] It is certainly a plausible argument and it supports the assertion at the beginning of this chapter that France's

[986] Isabelle Gillette-Frenoy, *'L'excision et sa presence en France'* (1992) GAMS 32, 33.
[987] Marie-Bénédicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J Cowan, M-B Dembour, and RA Wilson (eds*) Culture and Rights: Anthropological Perspectives* (Cambridge University Press, 2001) 62.
[988] Lucia Bellucci, 'Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of Excision' in René Provost (ed) *Culture in the Domains of Law* (Cambridge University Press 2017) 97.
[989] Ibid 99.

success was due to a combination of interconnected factors: the Human Catalyst and the Medium.

7.2.1 Comparing Responses in Healthcare

Effecting these changes in the law was a key aspect of the French success. The second key aspect which in effect 'fed' the first was the cooperation of PMI doctors in reporting cases of excision. The majority of excision cases were reported by doctors working in the *Protection Maternelle Infantile* (PMI) centres, which offer free medical care for all mothers with children up to the age of six. It is compulsory in France to take a child under the age of six for medical check-ups which are duly noted in the child's *Carnet de Santé*[990] (health book).[991] Receipt of social security is dependent upon participation in these medical examinations.[992]

Medical checks are done within the first 8 days of birth (1st health certificate is issued), the 2nd week, once a month up to 6 months, at 9 months (2nd health certificate), at 12 months, at 13 months, between 16 and 18 months, during the 24th or 25th month (3rd health certificate) then between the 3rd and 6th year with four exams for each year.[993] Doctors are required under Article 40 of the French Criminal Procedure Code to report any evidence of bodily harm on a

[990] This is a small booklet given to the parents when a child is born. It is presented on each medical visit and contains medical surveillance data on the child from birth up to age six.
[991] The official site of the French administration, 'Child's medical visits: compulsory examinations - Up to 6 years old' https://www.service-public.fr/particuliers/vosdroits/F35490/0?idFicheParent=F967?_x_tr_sl=fr&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc#0 accessed 22 November 2022.
[992] Home Affairs Committee, *Written Evidence Female Genital Mutilation* (HC 2014) para 4.6.
[993] The official site of the French administration, 'Child's medical visits: compulsory examinations - Up to 6 years old' https://www.service-public.fr/particuliers/vosdroits/F35490/0?idFicheParent=F967?_x_tr_sl=fr&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc#0 accessed 22 November 2022.

child. Health professionals are legally exempted from professional secrecy laws as long as the report is made in good faith; failure to report could lead to five years imprisonment or €75,000 fine.[994]

Health professionals are also required to comply with the recommendations of the *Académie Nationale de Médecine* (National Medicine Academy) aimed at eradicating FGM.[995] In the PMIs, the doctors receive instructions to perform external genital examinations of all girls during medical visits until the age of six and to note and date the state of the (normal) genitalia in the child's *Carnet de santé*; if the child comes from a practicing community it is further advised to note the date when the parents are informed of the dangers of FGM and the illegality of the practice in France.[996] It is important to clarify that genital examinations are performed on all children under six years in France – boys and girls, black and white – as part of the routine health checks during the mandatory medical visits.[997] To clarify further, while medical checks up to age six are a requirement, genital examinations are not, though they are routinely done.[998] Dr Emmanuelle Piet, French gynaecologist and County Medical Officer, explained the obligation to check the genitals at a UK Home Affairs Committee in 2016 as follows: -

> We have an obligatory medical certificate for babies at 8 days, 9 months and 24 months. You have to look at all of the baby and the sexual organs. It is obligatory for

[994] *Code pénal*, arts 226-13, 226-14 and 434-3.
[995] *Recommandations de l'Académie nationale de médecine visant, à l'éradication des mutilations sexuelles féminines* (MSF) (2004).
[996] Els Leye et al, 'An analysis of the implementation of laws with regard to female genital mutilation in Europe' (2007) 47 Crime Law Soc Change 16.
[997] Home Affairs Committee, *Roundtable Discussion on Female Genital Mutilation* (HC 2016) Q41.
[998] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 97.

> all doctors to look at the baby. If something is not normal, you have to say it. It is in our law to report. We have to report. That is the law. We report to the *procureur*—the prosecutor.[999]

The fact that these genital examinations are performed on all children regardless of race and gender, is a reflection of the French republican principle of universalism as is enshrined in the constitution. Article 1 of the French Constitution of 1958 provides that "France shall be an indivisible, secular, democratic and social Republic and shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion".[1000] To perform genital examinations only on African children, would be to impose a racial and cultural distinction – a recognition of cultural difference which is against the Constitution and is antithetical to the spirit of French republicanism. Amiraux asserts that the French firmly believe that justice can only be achieved by considering individuals as abstracted from what differentiates them[1001]; therefore, an understanding of French identity as is conceived in republican philosophy, must include the notion of "sameness", that is, colour and culture blindness. As Scott observes, in France "ascriptions of difference, conceived as irreducible differences, whether based on culture or sex or sexuality, are taken to preclude any aspiration to sameness".[1002]

This eradication of difference (though some might contend denial of difference) manifests practically through, for example, the law that prohibits collection of statistical data on grounds

[999] Home Affairs Committee, *Roundtable Discussion on Female Genital Mutilation* (HC 2016) Q37.
[1000] Constitution de la Ve République: *La France est une République indivisible, laïque, démocratique et Sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origines*.
[1001] Valérie Amiraux, 'Crisis and new challenges? French republicanism featuring multiculturalism' in Alessandro Silj (ed) *European Multiculturalism Revisited* (Zed Books 2010) 69.
[1002] Joan Wallach Scott, *The Politics of the Veil* (Princeton University Press 2007) 16.

of religion, race and ethnicity; or the law against wearing a full-face covering in public.[1003] It is, therefore, very much in keeping with republican tradition that genital examinations are performed equally on all French children without any distinctions. It is also important to note that the mutilation of sexual organs is not only confined to certain African communities, and does in fact happen across ethnicities, albeit the motivation may not be custom. The aforementioned Richer case for example, involved a white French woman who had no connection with FGM practising communities in France – she was simply a violent woman who mutilated her daughter.

Moreover, historically, FGM has been practiced in Victorian England and America as a "medical cure" for a number of female "infirmities"; it has been documented that in the 1800s clitoridectomy was performed in western societies in accordance with the "theory of reflex neurosis to treat depression, masturbation and nymphomania".[1004] In 1866, English doctor, Isaac Baker Brown, proposed in his book, 'On the Curability of Certain Forms of Insanity, Epilepsy, Catalepsy, and Hysteria in Females', that the feminine weaknesses (referred to in the title) could be cured by excising the clitoris, which procedure had to be followed by "careful watching and moral training" to make the improvement permanent.[1005]

In this regard, therefore, genital examinations can be used to check for and prevent genital mutilations of varying cause and motivation, including rape and sodomy on children. The genital examination intervention is a controversial subject in England (as will be shown in the

[1003] Refer to chapter five for discussion on the ban on collecting statistical data and the full-face covering.
[1004] Hilary Burrage*, Eradicating Female Genital Mutilation: A UK Perspective* (Ashgate Publishing 2015) 84.
[1005] Sheehan Elizabeth, 'Victorian Clitoridectomy: Isaac Baker Brown and His Harmless Operative Procedure' (1981) 12 Medical Anthropology Newsletter 9, 10.

forthcoming pages), however, Linda Weil-Curiel strongly advocates it as a tool for prevention and prosecution. According to her, it is a "good practice because it dissuades the mothers who know the doctor will check and report them to the police if they cut their daughters"; and it provides protection for both girls and boys – "it's not just focussed on excision, it can help detect other forms of violence against children, such as rape".[1006]

In another illustration of cultural sensitivity in France, the PMI doctors were initially unwilling to report excision cases despite the directives and the law, as they did not want the mothers to be taken to court.[1007] Although the doctors were against excision, they felt that the parents did not intend to harm the child and were only following their custom.[1008] The reluctance to report prompted the Paris regional doctor to invite Linda Weil-Curiel to explain the law to the doctors, after which they began reporting. Weil-Curiel's words below show how vital the doctors' cooperation was, not just for prosecution, but for the overall protection of girls at risk.

> If you have explained to the mother that not only is it [excision] illegal, but also detrimental to the health and well-being of her daughter, yet you see she has done it anyway and you don't report it, as the mothers talk amongst themselves, they will think, 'the doctor said not to do it, but I did it, he has seen it and nothing happened.' So everyone in the vicinity will think, 'they tell us not to do it, that we risk prison, but when they see it, they don't do anything, so let's continue.' So I said to the doctors, it is you now who endangers the next little girl in that family because you kept silent.

[1006] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 97.
[1007] Ibid 95.
[1008] Ibid.

> What will you say to these girls when they come to you years later and say, 'You could have prevented my mutilation and I hold you responsible for what happened to me'.

The healthcare aspect is an important distinction between France and England's response to FGM. Firstly, the requirement for compulsory medical visits for children under the age of six does not exist in England. In England, parents are offered regular health and development reviews (health visitor checks) for their child until the age of two and a half.[1009] Compliance with the health visitor checks is not mandatory although local authorities are legally mandated to "commission five universal health visiting checks for families"; the first visit at 28 weeks pregnancy, the second at 10-14 days after birth, the third at 6-8 weeks old, the fourth at 9-12 months old, the fifth at 2-2½ years old.[1010] Secondly, genital examinations are not performed during the health visitor checks, except for a boy's testicles which are checked at age 6-8 weeks.[1011] Thirdly, whilst mandatory reporting of FGM is required in England under section 74 of the Serious Crimes Act 2015, it is nonetheless said to be a "controversial and complex issue," as there is "widespread fear among key stakeholders that the requirements for mandatory reporting could be viewed as punitive by people in affected communities".[1012] Some healthcare professionals are concerned about being seen as racist, others about patient confidentiality and how reporting might affect openness from their patients, while others

[1009] NHS, 'Your baby's health and development reviews' (20 February 2020) https://www.nhs.uk/conditions/baby/babys-development/height-weight-and-reviews/baby-reviews/ accessed 23 November 2022.
[1010] UK Health Security Agency, 'Continuing the mandation of the universal five health visiting checks' (1 March 2017) https://ukhsa.blog.gov.uk/2017/03/01/continuing-the-mandation-of-the-universal-five-health-visiting-checks/ accessed 23 November 2022.
[1011] NHS, 'Your baby's health and development reviews' (20 February 2020) https://www.nhs.uk/conditions/baby/babys-development/height-weight-and-reviews/baby-reviews/ accessed 23 November 2022.
[1012] Options UK, *The Tackling FGM Initiative: Evaluation of the Second Phase (2013-2016)* (Options Consultancy Services Limited 2016) para 2.1.

simply do not accept it as their responsibility, rather, the responsibility of community leaders.[1013]

Such attitudes are symptomatic of excessive cultural sensitivity. Realistically, the complex nature of FGM and the fact that it *is* a cultural practice does invite a level of sensitivity, we have seen that to be the case even in France at the beginning. And although cultural sensitivity training is necessary for healthcare professionals dealing with FGM, undue cultural sensitivity can become counterproductive when it leads to inaction. Needless to say, failure to report FGM directly affects prevention and prosecution as the police rely on professionals in health, education and social care to identify and report cases.

Statistics on mandatory reporting by medical professionals appear to be unavailable, albeit judging from the four cases that have been prosecuted since 1985, it is perhaps to be expected. Nonetheless, to be sure, the Home Affairs Committee upon inquiry were informed by the Royal College of GPs that statistics on mandatory reporting by healthcare professionals were unavailable; similarly, the Home Office, Department for Health and NHS England were unable to provide any information on a freedom of request (FOI) for the number of cases of FGM reported to the police between 21 October 2014 and 10 January 2016.[1014]

It is important to note that while undue cultural sensitivity can be an impediment, respect and/or accommodation of the diverse cultural and religious beliefs of a multicultural society,

[1013] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 42.
[1014] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 46.

is nonetheless necessary for equal outcomes. In the context of healthcare, for instance, studies have shown that minority groups experience health inequalities.[1015] Initially, British health authorities adopted a colour-blind approach that assumed equal access to mainstream services for all, coupled with a policy of non-discrimination and equal opportunity.[1016] Despite evidence of health inequalities and discrimination affecting minority groups, the policy remained unchallenged until the early 1980s, when campaigning by minority-led groups raised awareness of the disadvantaged health position of minorities. This led the government to acknowledge "black and ethnic minorities as groups with specific needs to be addressed by the health authorities," requiring the NHS to give "special consideration to those groups' privacy and dignity with particular attention to respecting their religious and cultural beliefs".[1017]

This type of cultural accommodation is reflective of England's multiculturalist Medium which acknowledges cultural difference. To give a practical example, the NHS provides National FGM Support Clinics whereby women who have undergone FGM can "discuss their health needs in a sensitive and non-judgemental environment".[1018] For contrast, France does not provide a similar national FGM service, possibly because it would create an ethnic distinction among French women; however, centres such as the *La Maison des Femmes* which provides care for women who are victims of violence, has a specialised FGM care unit.[1019]

[1015] Donald Acheson, *Independent Inquiry into Inequalities in Health Report* (The Stationery Office 1998).
[1016] Anouk Guiné and Francisco J M Fuentes, 'Engendering Redistribution, Recognition, and Representation: The Case of Female Genital Mutilation (FGM) in the United Kingdom and France' (2007) 35(4) Politics & Society 487.
[1017] Ibid.
[1018] NHS, 'National FGM Support Clinics' (27 September 2022) https://www.nhs.uk/conditions/female-genital-mutilation-fgm/national-fgm-support-clinics/ accessed 28 December 2022.
[1019] *La Maison des Femmes*, 'Who are we?' https://www.lamaisondesfemmes.fr/je-decouvre-lmdf/qui-sommes-nous/ accessed 28 December 2022.

7.2.2 A Closer Look at the Genital Examinations

All three interrelated aspects of healthcare – mandatory check-ups up to age six, genital examinations and mandatory reporting by medical professionals – are important distinctions between France and England, with clear impact on prosecution outcomes. The issue of routine genital examinations on children, however, bears further scrutiny not only because it is crucial to France's success, but also because it highlights a fundamental difference in cultural attitudes.

Speaking at a Home Affairs Committee roundtable discussion on FGM in 2016, Linda Weil-Curiel advocated that routine genital examinations ought to be done in the UK as they had proved successful in prevention and prosecution in France.[1020] The notion of genital examinations in England is however, hugely controversial. Lord Berkeley indeed acknowledged this stating that "the idea of mandatory examination here would offend civil liberties and the mothers of young girls would be very upset"; he argued, however, that the government ought to consider "mandatory targeted examination" as "it would send a message to families who might be considering cutting their children. They might suddenly realise that they could be held to account. As far as I can see, this is a win-win situation for the Government. Even if it stopped a handful of children being cut, it would have achieved something".[1021]

Lord Berkeley's suggestion is also reflective of England's multiculturalist Medium since it proposes "targeted" examinations, that is, presumably targeted towards a particular minority

[1020] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 29.
[1021] HL Deb 11 December 2014, vol 787, col 526.

group. This sits in contrast to France's universal approach in which the examination is performed on all children. Lord Berkeley's approach would undoubtedly invite accusations of racism (Karen Bradley alludes to this below).

It appears, however, that majority stakeholders are opposed to the idea of mandatory genital examinations in England. Janet Fyle, professional policy advisor, Royal College of Midwives and Intercollegiate Group on FGM, said she did not "believe in the examination of girls"; Hibo Wardere, FGM survivor and anti-FGM campaigner, called it an "aggressive approach".[1022] Written evidence from the Home Affairs Committee also employed the word 'aggressive': "While we acknowledge the obvious temptation to introduce to the UK more rigorous medical examinations of young girls along the lines of the French approach, we urge caution before pursuing any aggressive practice of involuntary medical inspections of young girls".[1023] Karen Bradley, MP and Minister for Preventing Abuse, Exploitation and Crime, responded to the recommendation for genital examinations as follows: -

> On the point about routine examinations, I have a nervousness about introducing routine mandatory examinations of children—about whether we could have confidence that it would not be abused and would not be targeting specific ethnic groups. My understanding is that those examinations are not actually mandatory in France, but they are much more routine. I just have a nervousness about going down any route where we are forcing young people to have a very intimate examination, when I think we can find other ways to detect this crime.[1024]

[1022] Home Affairs Committee, *Roundtable Discussion on Female Genital Mutilation* (HC 2016) Q41.
[1023] Home Affairs Committee, *Written Evidence Female Genital Mutilation* (HC 2014) para 4.8.
[1024] Home Affairs Committee, *Oral Evidence Female Genital Mutilation* (HC 390, 2016) Q8.

The emotional language used by these individuals e.g. “nervousness” and “aggressive” combined with the lack of rational explanation as to why gently looking at the body of a very young child was dangerously invasive, suggest a visceral rather than reasoned response and raise the question of whether this is the result of cultural values acting upon individual perceptions.

It ought to be noted that whilst the French approach has been undoubtedly successful in prevention and prosecution, an unforeseen complication arose whereby some families delayed the practice until after the age of six in order to avoid detection.[1025] The Home Affairs Committee raised this point – “it has been shown that the French system has to some extent deferred the problem by encouraging some parents simply to wait for their daughters to get beyond the usual age range for the routine medical examinations before having them cut”.[1026] The Committee argued that while there was a strong case for implementing routine genital examinations in the UK, there was concern that the checks “could be unnecessarily traumatic for children”, suggesting that perhaps “medical examinations can have a role as a last resort in particularly high-risk cases”.[1027] Here as well, although very delicately put, one can infer that the suggestion is for targeted examinations as a last resort.

Nevertheless, despite France’s predicament of families that may opt to defer the practice, legal experts agree that the French system is more advantageous at identifying victims and

[1025] Linda Mururu, ‘Interview with Avocate Linda Weil-Curiel’ (2022) 3 JRJ 98.
[1026] Home Affairs Committee, *Female Genital Mutilation: abuse unchecked. Ninth Report of Session 2016–17* (HC 390, 2016) para 31.
[1027] Ibid para 31.

girl at risk. Neil Moore, Principal Legal Advisor to the Director of Public Prosecutions, Crown Prosecution Service, stated as much in his response to Linda Weil-Curiel's analogy: "Why is this different to any other child abuse? If a child was beaten black and blue, that would be prosecuted as a physical assault", he said: -

> The difference is that if a child was physically beaten in the home, somebody—a friend, a neighbour, a teacher—would notice that pretty quickly and they would report it. The difficulty with FGM is that it can take place and nobody is aware of it for a very long time indeed, at which point it becomes impossible to say who was actually there or responsible for the child at the time. You have the advantage, Madame, that in your country you have the mandatory examination.[1028]

Similarly, the Home Affairs Committee acknowledged the advantage of the French approach: "the greater number of French prosecutions is more directly a result of the rigorous system of identifying victims than any difference in the legal systems".[1029] Ultimately, however, discussions around the possibility of introducing genital examinations in England effectively end in a rejection of the intervention. It is argued that genital examinations on children is "extremely intrusive" and may be an infringement of the child's right to private and family life guaranteed under Article 8 of the European Convention on Human Rights; and further, that there is a risk of "creating distrust of medical professionals in affected communities" causing "unwillingness to use medical services in times of need due to fear of prosecution, which could be even more detrimental to the already vulnerable females in affected groups".[1030] The

[1028] Home Affairs Committee, *Roundtable Discussion on Female Genital Mutilation* (HC 2016) Q41.
[1029] Home Affairs Committee, *Written Evidence Female Genital Mutilation* (HC 2014) para 4.3.
[1030] Ibid para 4.7.

"official" justification for rejection, however, is the concern for the victims. The Home Affairs Committee put is as follows, "We remain concerned that adoption of the French approaches to identification of victims of FGM will not strike the appropriate balance between the pursuit of prosecution and the needs of victims. We stress that the dignity and particular needs of all victims should always be a primary concern".[1031]

The acutely contrasting attitudes in France and England toward genital examinations is as self-evident as it is revealing. Overall, France seems to adopt a somewhat utilitarian approach to the issue, with a willingness to take effective (albeit potentially uncomfortable) measures in order to protect the largest number of children. By comparison, England's approach is arguably individualistic, basing its refusal over concern for the 'dignity of victims', a concern which is, arguably, just as much an excuse, given the apparent preoccupation with 'offending' and not wanting to be 'aggressive'. This sanitized approach has largely resulted in inertia and consequently neither the victims nor girls at risk are protected. The fear of offending civil liberties (as Lord Berkeley put it) and by extension the matter of undue cultural sensitivity, is a huge impediment in England, whereas the French have been decisive and uncompromising in their approach. To illustrate, Linda Weil-Curiel views the genital examinations simply as a "medical act" intended to protect the child, deeming all else (the arguments proffered in England) as irrelevant; she asserts that, "we cannot be lenient because it's not fair on the children, they're the victims not the mothers".[1032]

[1031] Home Affairs Committee, *Written Evidence Female Genital Mutilation* (HC 2014) para 4.8.
[1032] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 97.

One could argue that Weil-Curiel's attitude, moreover her attitude as a Frenchwoman, is linked strongly to the prevailing republican tradition that does not distinguish between a black child and a white child, or a black mother and a white mother, and whereby law and policy applies equally to all. In this way, the Human Catalyst is herself the product of the Medium, naturally espousing the values and norms of the Medium. This sort of "republican programming" innate in the French naturally produces a willingness to adopt and adhere to measures that outsiders may deem aggressive or controversial.

This is similarly demonstrated in the full-face covering ban controversy, internationally criticised as being discriminatory against Muslims.[1033] The Islamic veil which physically highlights and imposes a kind of religious/cultural demarcation, is a blatant counterexample of the singular oneness and sameness that constitutes the French republican vision of society.[1034] In fact, it is the veil itself that is considered aggressive in France: "In the public space, the wearing of headscarves can be considered an illegitimate act of propaganda and an aggressive act of proselytism".[1035] Thus while the ban may be viewed by outsiders as discriminatory, to the French it is a matter of ensuring uniformity in the public domain – a norm that is fundamental to the ethos of French republicanism.

The point being made is that citizens in France and England (and any other jurisdiction for that matter) naturally tend to espouse the standards and norms of their country – being products of their own environment. Consequently, their response as private citizens or public officials

[1033] Myriam Hunter-Henin, 'Why the French don't like the Burqa: *Laïcité*, National identity and Religious Freedom' (2012) 61 ICLQ 637.
[1034] Joan Wallach Scott, *The Politics of the Veil* (Princeton University Press 2007) 16.
[1035] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press 2008) 53.

to certain rules and regulations will often reflect inherent societal norms. These inherent societal norms are what I have identified as the deterministic forces and collectively named the *Medium*. The Medium thus plays two roles, it moulds the citizenry and is the mechanism through which the society functions.

7.2.3 French Collectivism vs British Individualism

In every jurisdiction, participation of the citizenry in governance is not only necessary but required "if the pronouncements of executive and legislative authority are to be more effective".[1036] García Oliva and Hall realistically, and rather humorously, describe the need for participation and compliance as follows: -

> Public authorities are not staffed by robots or aliens, and the individuals acting on behalf of the State are citizens drawn from the same society as their privately employed neighbours. These men and women have to interpret and apply law and regulations made pursuant to laws, and if they are not willing to implement a particular policy in the way it was intended, it will never make the transition from theory to practice as envisaged by its architects.[1037]

The foregoing sentiment brings us back to the original point concerning practitioners' readiness to actually resort to criminal law interventions. From comparison, it is clear that there is more willingness to implement the law in France than there is in England. But why are

[1036] Javier García Oliva and Helen Hall, *Constitutional Culture, Independence and Rights: Insights from Quebec, Scotland, and Catalonia* (University of Toronto Press 2023) 377.
[1037] Ibid 378.

the French more inclined to act and comply with the law in this manner than the English? The aforementioned remarks on the Medium moulding the citizenry – the innate republican tradition – as well as the wider discussions in chapter five on the particularity of French republicanism, all go to answer this question. Moreover, the concept of voluntary consent to the Social Contract may provide further insight. Although historians argue that Rousseau's philosophies were rather superficially interpreted and implemented by the revolutionaries, they do concede that the Social Contract and the General Will greatly informed the values and politics of the revolution, and thereby the new French republic.[1038] As Brunstetter observes, French republican philosophical tradition is based upon "voluntary consent to the social contract which requires the integration of everyone to an ensemble of non-negotiable and shared values determined by the general will of society".[1039] Brunstetter further explains the importance of the shared values as follows:-

> These values—democracy, human rights, equality, and secularism—are what Todorov calls the 'spirit of the Enlightenment', and have, he claims, 'incontestably triumphed.' They are issued from the institutions of the Republic which 'are organized in the view of general interest and the common good. They have been approved by the people and its representatives.' They thus, as Rousseau explains, ought to persuade members of the body politic to 'obey [the laws] freely, and bear with docility the yoke of public happiness.'[1040]

[1038] See for example, François Furet, 'Rousseau and the French Revolution' in Clifford Orwin and Nathan Tarcov (eds) *The Legacy of Rousseau* (University of Chicago Press 1997); Joan McDonald, *Rousseau and the French Revolution* (Athlone Press 1965); and Alfred Cobban, *Rousseau and the Modern State* (George Allen and Unwin 1934).
[1039] Daniel Brunstetter, 'Rousseau and the tensions of France's *Contrat d'Accueil et d'Inte´gration'* (2012) 17(1) Journal of Political Ideologies 108.
[1040] Ibid 111.

It seems, therefore, emerging from the voluntary participation in the Social Contract, is a concomitant sense of ownership and responsibility over the shared societal values, which consequently produces an innate obligation to comply with legal directives. According to Rosenblatt, the social contract was "a covenant between individuals [who] promised themselves and each other that henceforth they would put the common good and the long-term interest of the community above their own personal interests," which covenant "turned them into a sovereign body".[1041] Having delineated the reverence with which republican tradition is held in France, it is perhaps fair to say that Rousseau's Social Contract, upon which French republicanism is constructed, has inadvertently shaped how the citizenry perceives its obligations to the state. Favell asserts that the subordination of self-interests to the all-encompassing collective interest, "is what enables the nation-state to constitute itself and be the democratic *République* of philosophical lore".[1042]

Arguably, this act of subordination and solidarity, could further explain the distinct healthcare interventions in France, and the willingness to comply with them. For instance, the compulsory medical checks for all children up to the age of six demonstrates placing the collective interest of children's welfare above the individual self-interests of parents, and the subordination of those personal interests through compliance. In the same way, the genital examinations of all children up to the age of six denotes this subordination, and is perhaps a

[1041] Helena Rosenblatt, *Rousseau and Geneva from the First Discourse to The Social Contract, 1749–1762* (Cambridge University Press 1997) 247.
[1042] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 81.

more compelling demonstration of it, since the examinations are non-compulsory yet they are routinely done.

Interestingly, these deductions of a French tendency toward collectivism and an English tendency toward individualism, appears to be somewhat reflected in the results of the Eurobarometer survey, conducted by the European Commission, which "asked people across the continent whether, looking forward to the future, they would rather society be more based on 'individualism' or 'solidarity'". The survey revealed that France supported a solidarity-based society, with 86% voting for solidarity and 6% voting for individualism; in the UK, 52% voted for solidarity and 29% voted for individualism.[1043]

Favell avers that the "voluntary and self-conscious" participation in the social contract is made possible by the fact that the people's "liberty, unity and cohesion all coincide in a national political identity, which unites them as a political citizenry". It is therefore hardly unreasonable to suggest that the French (and their institutions) are somewhat predisposed to collectively embracing the obligations imposed by government as their own. As Rosenblatt avers, "while obedience to the whims of magistrates is tantamount to moral slavery, 'obedience to the law one has prescribed for oneself is freedom'".[1044] As Villard and Sayegh assert, French republican institutions are "characterized by a rigorous political and ideological centralism" which is derived from the republican notion of a homogenous cultural identity.[1045] Indeed, the

[1043] Jon Stone, 'Britain is the most individualistic country in the EU, Europe-wide survey finds' *Independent* (Brussels, 19 December 2017) https://www.independent.co.uk/news/uk/politics/brexit-britain-eurobarometer-individualism-soldarity-eu-politics-a8118581.html accessed 23 December 2022.

[1044] Helena Rosenblatt, *Rousseau and Geneva from the First Discourse to The Social Contract, 1749–1762* (Cambridge University Press 1997) 244.

[1045] Florent Villard and Pascal-Yan Sayegh, 'Redefining a (Mono)cultural Nation: Political Discourse against Multiculturalism in Contemporary France' in Raymond Taras (ed) *Challenging Multiculturalism* (Edinburgh University Press 2012) 238.

readiness with which medical professionals in France report FGM cases directly to the authorities testifies to a centralist attitude that is lacking in England as seen in the prevailing attitudes toward mandatory reporting.[1046]

In France, there is a kind of higher collaboration between the individual and the state, since, as Brunstetter explains, the laws are approved by the people and "are organized in the view of general interest and the common good" thus the members of the body politic are persuaded to obey the laws freely.[1047] Arguably, the Social Contract resonates more strongly in France because it is intertwined with the innately held republican identity. In England, the relationship between the individual and the state is more prescriptive, and as Favell explains, this dynamic "reverses the primacy of polity to society": -

> The British conception of the relation of state to individual – with its canonical accent on negatively protecting the individual from the state rather than positively forming the political citizen through political participation – reverses the primacy of polity to society, thus allowing a wide sphere of culture untouched or unstructured by the public political sphere; hence, the flourishing of multiculturalism and the concept of race relations as the 'management' of public order, rather than the principled laying down of rules on an *a priori* basis.[1048]

[1046] Renée Kool and Sohail Wahedi, 'European Models of Citizenship and the Fight against Female Genital Mutilation' in Scott N Romaniuk and Marguerite Marlin (eds) *Development and the Politics of Human Rights* (1st edn, Routledge 2015) 213.
[1047] Daniel Brunstetter, 'Rousseau and the tensions of France's *Contrat d'Accueil et d'Inte´gration'* (2012) 17(1) Journal of Political Ideologies 107, 111.
[1048] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 96.

Backtracking on Lord Berkeley's comment, that the idea of genital examinations would offend civil liberties and upset mothers[1049], this may indeed be the case, going by the attitudes of stakeholders below. Linda Weil-Curiel recalled a conversation she had with Lynne Featherstone, former Parliamentary Under Secretary of State for Women and Equalities, on the subject of genital examinations as follows: -

> In 2011, I had a heated discussion with a female British politician (Lynne Featherstone). I was talking about these genital checks. She said vehemently that she would never allow a doctor to examine the private parts of her daughter. She wouldn't even conceive that it is a medical act in order to protect the child.[1050]

The discussion got similarly heated during the Home Affairs Committee roundtable discussion on FGM, in which Hibo Wardere grilled Dr Piet on the genital examinations in France, as follows: -

> ***Hibo Wardere:*** I have two questions for the ladies from France. First, I want to know whether their law applies to the white French kids—whether everyone has to be examined. The other question is this. Does their law say that only the people who come from these countries specifically have to be checked? That seems like a discriminatory law. Is your law targeted; does it target these coloured children?
>
> ***Dr Piet:*** It is every child—not the children from these countries, but every child.
>
> ***Hibo Wardere:*** Even the French ones?

[1049] HL Deb 11 December 2014, vol 787, col 526.
[1050] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 97.

Dr Piet: Even the French ones. It is every child—girls and boys. You have to see—

Hibo Wardere: So what happens to the kids whose mothers and fathers you have jailed? Are you providing psychological support? Are you there? How are they feeling? You have to understand that the parents who are committing these crimes—FGM is a crime; I agree with that. But you have to understand that in the communities we come from, we do not see this as child abuse. These parents are loving parents. They think that what they did is a loving thing because that is what was done to them and that is the mentality they have. Do you consider that perhaps you should open up a different approach from your approach of being aggressive—the way you go for it?[1051]

It is necessary to state that these attitudes merely represent those of a few individuals in the public eye and, therefore, cannot be taken to reflect the majority, especially in the absence of an empirical investigation. We can glean, however, how members of the Somali community in Bristol feel about safeguarding protocols that may require their children to be examined if authorities suspect FGM. The following is an excerpt from a report by the University of Bristol on the experiences of Somali families in Bristol with regard to anti-FGM safeguarding policies: -

> *They say they going to check the children. So, we as parents have to prepare them. We have to say, when we come back from holiday, the GP might need to check your private parts. The girls they don't understand. They say, 'but Mum, you always told us that no one's allowed to see your private parts, [...] so why do I have to show it?' For us as a parent, to explain, it's so hard. And the girls,*

[1051] Home Affairs Committee, *Roundtable Discussion on Female Genital Mutilation* (HC 2016) Q41.

> *they keep worrying about it, when they go to school - is it going to happen today? Tomorrow? And if you say, 'you have to go to the doctor,' they say, 'Mum, is it for my private parts?'*[1052]

The above sentiment reveals that genital examinations can be distressing for young girls. This is not an issue that should be ignored, but professionally managed. It is worthwhile to state that the above excerpt refers to a scenario in which FGM is suspected and thus an examination is required, which would understandably cause anxiety.[1053] In France, however, genital examinations are routinely done as part of a mandatory (full-body) medical check-up from infancy up to age six, perhaps creating a certain familiarity or awareness that may blunt such anxieties. If the person interviewed above was resident in France and had been taking their child for a medical examination that included checking the child's genitals every year, would they feel differently?

The foregoing notwithstanding, FGM, though complex in its family/community dynamics, is objectively speaking, a traumatising subject much like child sexual abuse, thus even when sensitively addressed, it will still involve some level of discomfort. Accordingly, the duty of concerned professionals (which requires training) is to mitigate this reality as much possible, and at least strive for an approach that may be said to be at most uncomfortable but not traumatic.

[1052] Saffron Karlsen et al, *When Safeguarding Becomes Stigmatising: A Report on the Experiences of Somali Families in Bristol with Anti-FGM Safeguarding Policies* (University of Bristol 2019).
[1053] NPCC and CPS, *Protocol on the handling of Female Genital Mutilation (FGM) offences between the National Police Chiefs' Council and the Crown Prosecution Service* (2016) paras 4.8-4.10.

One might wonder if practising communities in France perceive the intervention similarly to the Somali community in Bristol, or are they just as matter-of-fact about it as their adopted society is? Does each group reflect the values and norms of their respective society or is there a convergence of perspective by virtue of a shared custom? In the absence of an empirical study, one can only speculate. What is certain, however, is that immigrants in France are required through the *modèle français d'intégration* to fully adopt the French way of life. Under French law, FGM is illegal and children under the age of six must be taken for mandatory medical checks; the immigrant must therefore abide by these rules. As previously discussed, to obtain long-term residency in France, immigrants are required to sign the *Contrat d'Accueil et d'Intégration*.[1054] Brunstetter explains that "the language of the immigrant contract taps into a republican philosophical tradition in which the legitimacy of the state is based on voluntary consent to the social contract".[1055] Therefore, in signing the immigrant contract, the immigrant also 'signs' the social contract, thereby voluntarily consenting to abide by the rules of the Republic. According to Brunstetter, the act of signing the immigrant contract is both a "privilege" and "a duty", he expounds on this as follows: -

> The enjoyment of equal rights and access to social programmes thus comes at the price of the duty to abide by the values of the state, which may limit the perception of liberty and equality for those who hold different cultural views. Rousseau is clear that in signing the social contract, one cannot enjoy equal rights without fulfilling certain duties: 'In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses

[1054] See Chapter Five 5.2.
[1055] Daniel Brunstetter, 'Rousseau and the tensions of France's *Contrat d'Accueil et d'Inte´gration'* (2012) 17(1) Journal of Political Ideologies 111.

to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free.'[1056]

In this way then, irrespective of how practising communities in France perceive genital examinations, they are required to abide by the rules of France, to which they are now (contractually) bound, and to which every French citizen must also equally abide.

Going back to the remarks by Lynne Featherstone and Hibo Wardere, though they do not represent the majority, they are nonetheless illuminating and some deductions can be made from them. Arguably, as suggested in foregoing pages, their attitudes generally reflect the more individualistic British approach, as opposed to the utilitarian/collective French approach. Commingled therein are also innately held perceptions on parental rights/parental consent. The issue of parental rights is relevant since the proposed genital examinations would be performed on minors. In England, children cannot legally consent to medical treatment until the age of 18.[1057] Some flexibility does exist in the law known as Gillick competence, established in *Gillick v West Norfolk and Wisbech Area Health Authority*[1058]*,* which established the principle that a child under the age of 16 will be competent to consent to medical treatment if they are found to have achieved "a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".[1059] Similarly in France, a child under the age of 18 is considered a minor and thus cannot legally consent to medical treatment, however, if the child is capable of discernment, the parents' final decision should take into

[1056] Ibid.
[1057] Children Act 1989, s 105(1); Family Law Reform Act 1969, s 1.
[1058] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
[1059] Ibid [188–189] per Lord Scarman.

account the child's opinion.[1060] In both countries, therefore, genital examinations cannot proceed without the parent's consent and involvement.

While parents do have a legal right to exercise control over their children, Lynn Featherstone's remark does reveal a common attitude of possessing a kind of incontrovertible 'right of ownership' over one's children, which can be problematic, particularly when the undertone is 'I can do whatever I like'. In this regard, Lord Fraser stated in *Gillick v West Norfolk and Wisbech Area Health Authority* that, "parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family".[1061] This proprietary entitlement over one's children is reinforced by what Dimopoulos terms the "liberal concept of family privacy", which exists within the distinction of the public and private domain.[1062] Dimopoulos asserts that the concept of family privacy "understands privacy as a protection against unwarranted state interference in the family"[1063] or "the right of parents to exclude the state from intervening in decisions regarding their children".[1064] Featherstone's remark demonstrates the problematic side of parental right and the concept of family privacy.

[1060] *Code civil* 1804, articles 388 and 388-1; European Union Agency For Fundamental Rights, 'Consenting to medical treatment without parental consent' (2018) https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements-concerning-rights-child-eu/consenting-medical-treatment-without-parental-consent accessed 21 December 2022.
[1061] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at para 170 per Lord Fraser.
[1062] Georgina Dimopoulos, 'A theory of children's decisional privacy' (2021) 41 Legal Studies 439.
[1063] Ibid.
[1064] Anne C Dailey, 'Constitutional privacy and the just family' (1993) 67 Tulane Law Review 985.

7.2.4 The ECHR and the Issue of Genital Examinations

Legally, the right to family privacy is guaranteed under Article 8 of the European Convention on Human Rights (ECHR) which provides that, "Everyone has the right to respect for his private and family life, his home and his correspondence".[1065] The Home Affairs Committee relied on this provision to justify their rejection of genital examinations in England, arguing that such an intervention would infringe upon a child's Article 8 rights. Lord Berkeley's comment on offending civil liberties would have also been referring to Article 8 of the ECHR.

At this juncture, the question that arises is, does the intervention not offend civil liberties in France? After all, France is also a signatory of the ECHR. In other words, does France infringe upon Article 8 by allowing genital examinations on children? First, let us examine whether the article imposes upon France any obligations. Through case law, the European Court of Human Rights (ECtHR) has "inferred from the term 'respect'", as is used in the first paragraph of Article 8, that it "places positive obligations on the state in addition to the duty of non-interference in private and family life".[1066] In *Marckx v. Belgium* the ECtHR noted that "the object of the Article is essentially that of protecting the individual against arbitrary interference by the public authorities" but that nonetheless, the article does not "merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life".[1067] According to the ECtHR, in practice, positive obligations "require national authorities to take the necessary

[1065] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 art 8(1).
[1066] Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* (Human Rights Handbooks No 7, Council of Europe 2007) 36.
[1067] *Marckx v. Belgium* (1979–80) 3 EHRR 230 para 31; Dr Ursula Kilkelly, 'Protecting children's rights under the ECHR: the role of positive obligations' (2010) 61(3) Northern Ireland Legal Quarterly 249.

measures to safeguard a right, or more specifically, to adopt reasonable and suitable measures to protect the rights of the individual".[1068] Accordingly, France is not only required not interfere with the right but is also obligated to take measures within its own domestic laws that ensure the right is safeguarded.

However, some convention rights can be limited or restricted when the state has a legitimate reason to do so. Indeed, whilst Article 8 is an inviolable right, it is not absolute and is subject to restrictions as is provided in the second paragraph: -

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[1069]

Therefore, the argument (on England's part) that genital examinations infringe upon article 8, can be qualified by paragraph 2, which allows state interference in order to safeguard the rights and freedoms of children (in this case) which are threatened by FGM. These rights and freedoms include the right to life (Article 2), the right to liberty and security (Article 5) and, indeed, the right to respect for private and family life (Article 8) which covers "the physical and moral integrity of the person".[1070] In this regard then, although France's use of genital

[1068] Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* (Human Rights Handbooks No 7, Council of Europe 2007) 7.
[1069] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 art 8(2).
[1070] Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* (Human Rights Handbooks No 7, Council of Europe 2007) 37.

examinations may infringe upon a child's right to physical integrity, it is a legitimate infraction of that right since it is a measure designed to safeguard children's wellbeing, thereby protecting their rights and freedoms aforementioned. Consequently, England's justification for refusal of the intervention, as is based on Article 8 of the ECHR, fails.

Moreover, concurrent with positive obligations, states also enjoy a margin of appreciation in "determining the steps to be taken to ensure compliance with the ECHR with due regard to the needs and resources of the community and of individuals".[1071] The margin of appreciation is a concept developed in the jurisprudence of the ECtHR, that "suggests an ambit of discretion, 'latitude of deference or error', or 'room for manoeuvre', given to national authorities in assessing appropriate standards of the Convention rights, taking into account particular values and other distinct factors woven into the fabric of local laws and practice".[1072] In respect to Article 8, Akandji-Kombe explains the margin of appreciation as follows:-

> The specific nature of Article 8 has led the Court to allow states a wide margin of appreciation. First of all there is the fact that the Convention itself provides that the right to private and family life may be subject to restrictions (Article 8, paragraph 2). Then there is the fact that, as is emphasised in the case-law, "the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary

[1071] Dominic McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' (2016) 65 ICLQ 21-60.
[1072] Yutaka Arai-Takahashi, 'The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry' in Andreas Føllesdal et al (eds) *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 62.

> considerably from case to case. Finally, the fact is that in cases involving Article 8 the states parties, and then the Court, are bound to arbitrate between the rights of the applicant and those of other persons. Consequently – but this is no surprise – the attitude of the European Court here, if not less militant, is at least less prescriptive.[1073]

Thus, further to the restrictions in paragraph 2, France has even more scope to limit Article 8 under the margin of appreciation.

It is also necessary to point out that the ECHR is a living instrument and what we consider as an infringement of the treaty can change over time. Letsas avers, in this regard, that international human rights treaties evolve over time in the same way a constitutional bill of right does, since: -

> They both contain lists of abstract fundamental rights that individuals have against government [and they both] face the need to accommodate constant and drastic societal changes in relation to these abstract rights, changes that were not anticipated at the drafting stage – or in the case of treaties, at the stage of state accession. Radical changes in societal beliefs about these abstract values poses a distinctive challenge for any court, be it domestic or international, that adjudicates on issues of fundamental human rights.[1074]

[1073] Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* (Human Rights Handbooks No 7, Council of Europe 2007) 37.
[1074] George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal et al (eds) *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 107.

In the area of children's rights, a good example of change in societal belief is on the use of corporal punishment. In 1982, the ECtHR held in the case of *Campbell and Cosans v The United Kingdom* which challenged the use of corporal punishment in schools as a disciplinary measure, that "the duty to respect parental convictions in this sphere cannot be overridden by the alleged necessity of striking a balance between the conflicting views involved, nor is the Government's policy to move gradually towards the abolition of corporal punishment in itself sufficient to comply with this duty".[1075] While corporal punishment had been accepted in society as normal and even necessary to a child's 'proper' upbringing, this attitude changed over time, culminating in a legal challenge to the status quo. The case became a landmark in the UK, when the government introduced the Education Act in 1986 abolishing corporal punishment in state schools.[1076]

The point being made is, the ECHR being a living instrument, must be interpreted in accordance with present-day conditions. FGM is a present-day condition and therefore, Article 8 (with regards to genital examinations) ought to be interpreted in light of the need to protect the greatest number of children against the practice.

The foregoing case is an example of how the boundaries of what we tolerate moves over time, and that often, the tipping point that warrants the interference of human rights is spurred by the efforts of individuals (Human Catalysts). The important role that ordinary individuals play in helping bring out such change is significant, and an interesting observation of the micro (the

[1075] *Campbell and Cosans v The United Kingdom* App. No. 7511/76, 7743/76, 4 Eur. H.R. Rep. 293 (1982).
[1076] Council of Europe, 'Teachers stop hitting children after Scottish mums complain to Strasbourg' https://www.coe.int/en/web/impact-convention-human-rights/-/teachers-stop-hitting-children-after-scottish-mums-complain-to-strasbourg accessed 22 December 2022.

Human Catalyst) and macro (the Medium) working together. This was indeed the case in France, whereby the Human Catalyst's efforts, combined with the Medium, positively changed the trajectory of FGM.

7.2.5 Race and the Genital Examinations

Hibo Wardere's remarks further to revealing the individualistic British tradition, (she is, after all, a product of her environment, in the same way Linda Weil-Curiel is a product of hers) brought out elements of culture and race. Her apparent assumption that genital examinations in France are only performed on African children is, from an objective standpoint, not unreasonable. In the context of FGM, one would expect that the purpose of such an intervention would be to identify victims and safeguard those at risk, and since FGM is typically practised by (some) African and Asian communities, then one cannot reasonably expect white children to undergo the examination as it would be a pointless exercise.

Whilst this is, arguably, a reasonable perspective for persons outside of France to hold, conversely, it is an entirely unreasonable perspective to have in France because of the distinction it creates. And while such a distinction would be branded discriminatory, genital examinations in France are universal, not necessarily to avoid accusations of racism, rather, because it is the natural product of a republican tradition that envisages a society without social distinctions. This is a somewhat nuanced point on the particularity of French republicanism, and an illustration of how it manifests in real-life. Although FGM is a problem that only affects a minority group in France, it has been dealt with in universalist terms, a direct reflection of the values and norms of French republicanism.

To further illustrate the point in practical terms, in France, FGM is prosecuted using the provisions of the penal code, rather than enacting a specific law, as that would create a cultural distinction whereas the aim of the French model of integration is the eradication of cultural distinctions. This is also the reasoning behind prosecuting excision cases before the *Cour d'Assises* like any other case of mutilation. And the same reasoning applies to the genital examinations performed on all children as explained.

So, while to an outsider it may seem that these examinations are ultimately targeted at the African community, the subtle point is, a culturally targeted intervention is in fact antithetical to French republicanism, making it dead on arrival. In other words, such a culturally targeted intervention would be an abnormality, thus it would be inconceivable from the beginning. This is the important, yet nuanced point that those who oppose the examinations in England often miss about the French approach. Decrying the intervention as "targeting" immigrant communities is (to the French at least) a misguided notion, for such interventions do not exist within the meaning of French republicanism. This, indeed, is the French particularity and what distinguishes its FGM approach from England's. France's distinct interventions may appear peculiar to outsiders because they are a product of the French particularity, which in itself is a concept that is difficult to grasp.

Britain's philosophy on integration, on the other hand, is not as innate, static, singular or clear cut. Favell avers that, unlike France, "Britain does not have an implicit British ideal or creed

against which the dilemma of sub-optimal realisation can be matched".[1077] However, he does contend that the apparent void of "explicitly philosophical terms" is "perfectly characteristic of the kind of justification that in fact exists: the 'Great' British art of calculated, piecemeal, evolutionary, 'anti-philosophical' pragmatism".[1078] Indeed, as delineated in chapter six, it is hard to pinpoint a singular British approach to multiculturalism, rather it is a fragmented approach combining strict immigration controls, anti-discrimination laws and MCPs implemented at the local level on a needs basis.[1079] There is therefore the recognition and accommodation of difference but within a framework of commonly held British values. If there is conflict between British values and the values of the minority, British values prevail. This was demonstrated in the passing of the original FGM Act in 1985 which despite criticisms by minority-led NGOs as being discriminatory, still passed, and the distinction between FGM and the trimming operations (modern-day female genital cosmetic surgery) based on the question of custom or tradition.[1080]

This has been referred to as "pluralistic integration" – a system in which participation is on the basis of equality, within a framework of common legal and political institutions, but allowing some degree of recognition for diversity and specificity.[1081] It is, arguably, a rather ambiguous and precarious approach, as the 'degree of recognition' is indeterminate and thus dependent on the whims of the majority.[1082] Favell calls it the "quite life", according to him, "Britain's

[1077] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 229.
[1078] Ibid 96.
[1079] Richard T Ashcroft and Mark Bevir, 'British Multiculturalism after Empire' in Richard T Ashcroft and Mark Bevir (eds) *Multiculturalism in the British Commonwealth* (University of California Press 2019) 32.
[1080] See section 6.12 for a discussion on the passing of the Prohibition of Female Circumcision Bill.
[1081] R D Grillo, *Pluralism and the Politics of Difference: State, Culture, and Ethnicity in Comparative Perspective* (Oxford University Press 1999) 177.
[1082] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 123.

philosophy explicitly tries to play down issues as the best way to deal with them, [and] is all too likely to settle for the 'quite life' if the ethnic minorities themselves do not participate, agitate or assert their demands for a principled response".[1083]

Therefore, if 'sameness' and 'oneness' is not an absolute and intrinsic requirement within Britain's national philosophy, then the notion of genital examinations for both black and white children could not be reasonably expected in the first instance – the inverse of the French. It may be proposed that the intervention only apply to a particular ethnic group – this was perhaps the gist of Lord Berkeley's proposal for "mandatory targeted examination", however, this would likely invite accusations of racism and discrimination, as was the case when the Prohibition of Female Circumcision Act was proposed in 1983. Consequently, an impasse exists in England, since to distinguish between black and white children would be called racist, yet the suggestion of universal genital examinations is rejected for offending civil liberties, being aggressive, being traumatising to children and the like.

While on the topic of racial discrimination, one might question whether the same impasse would exist if it were white children who were at risk of FGM. The point was similarly raised by Sue Mountstevens, former Avon and Somerset Police and Crime Commissioner, following Hibo Wardere's remarks: -

> **Sue Mountstevens**: Can I just say that if we had 65,000 little white girls involved in this, we would not be having this discussion about mandatory examination? I would

[1083] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 229.

> also like to say that in Bristol, we have 2,000 who are at risk of FGM this summer. Again, if we had 2,000 little white girls who might have their right leg cut off, we would not be having this conversation.[1084]

France, by virtue of its strict assimilation policy, is typically accused of intolerance and discrimination of the Other – as Favell observes, "the British are prone to mischaracterise the French conception as crudely assimilationist, intolerant and culturally exclusionary".[1085] Yet, ironically, France is objectively precluded from such indictments in its universalist approach to FGM, a rather remarkable accomplishment given the culturally distinct nature of FGM. England's response to FGM, on the other hand, has faced accusations of racism and discrimination – the Prohibition of Female Circumcision Act 1985, for example, which was perceived by some NGO's as being discriminatory against African women.[1086] And it is felt by the Somali community in Bristol, that some anti-FGM safe-guarding protocols, for instance, the reaction over holidays abroad, are stigmatising and racially motivated: -

> As a parent, they feel their right to take their child on holiday is taken from them because they get questioned about it and there's a whole palaver about – *'where you taking them?' 'Why are you taking them?' I have to answer your question before going on holiday? You wouldn't ask me if I was a different race.*

[1084] Home Affairs Committee, *Roundtable Discussion on Female Genital Mutilation* (HC 2016) Q41.
[1085] Adrian Favell, *Philosophies of integration: Immigration and the idea of citizenship in France and Britain* (Palgrave Macmillan Limited 2001) 95.
[1086] Elise A Sochart, 'Agenda Setting, the Role of Groups and the Legislative Process: the Prohibition of Female Circumcision in Britain' (1988) 41(4) Parliamentary Affairs 521.

> *You're asking me because of what I look like, where I'm from, where I'm going.*[1087]

Moreover, "Parents reported instructing their daughters not to spend too long in the school toilet on the understanding that prolonged time spent in the bathroom, even for innocent reasons, could be misinterpreted as evidence of experience of FGM"[1088]: -

> *If you come back from holiday, you have to tell your daughters, if they go in the toilet for longer than 10 minutes, then. And some girls, they love to go to toilet, just for a chit chat. They go in there to chat, talk about holiday. But then the teacher [she feels she] needs to keep an eye out. If she sees a Somali girl walking out the room, she needs to put a time on her, which is again stigmatising, because a British girl, she might not [feel the need to] check the time. If they are staying more than 10 minutes, report her. So just let your girls know, wee and go back to the classroom.*[1089]

In light of this, another irony appears – England, which compared to France is seen to be more accommodating of cultural difference, is accused of perpetuating racism because of its 'culturally targeted' responses to FGM. In a sense, one understands that there is a level of difficulty in avoiding such indictments, given the culturally distinct nature of FGM, yet France

[1087] Saffron Karlsen et al, *When Safeguarding Becomes Stigmatising: A Report on the Experiences of Somali Families in Bristol with Anti-FGM Safeguarding Policies* (University of Bristol 2019) 42.
[1088] Ibid.
[1089] Ibid.

avoids the accusation (as far as can be gleaned, a priori, from its interventions), thus making a case for its universalist republican approach.

7.3 Conclusion

It is necessary to reiterate what was stated at the beginning, that the sustained efforts of Linda Weil-Curiel (the Human Catalyst), combined with the overarching approach to multiculturalism and French republicanism (collectively the Medium), produced the French success – which assertion has been demonstrated. These two elements are inextricably interconnected and each plays an important role in the overall success of the French approach. The Human Catalyst is the tangible individual force that galvanises action against FGM through activism, while the Medium is the intangible, underlying deterministic forces constituting French republicanism. The Medium has always existed as an influencing force in the society and it organically lends itself to the Human Catalyst's efforts, because it constitutes a system with the right universalistic conditions to make her work succeed. As explained, the Human Catalyst is also a product of the Medium thus adding another layer to their interconnectedness.

At the centre of this chapter, and by large this thesis, has been the comparative aspect between France and England's approach to FGM. It is no surprise at this stage, that France has been the most successful in combating FGM. Success is a rather relative and subjective term to use in the case of FGM, since firstly, there have been victims – some who have died; secondly, it is impossible to know the full extent of the problem (and the harm caused) given

its clandestine nature; and lastly, some, particularly those from affected families and communities who understand the complexities, may not consider interventions that lead to parents being jailed successful (we saw this with Hibo Wardere for example). This obviously ultimately comes down to the view which is taken of the purpose and function of criminal law itself.

Nonetheless, in terms of prosecution outcomes, and prevention, France takes the prize. And whereas some perspectives question the methodology of France, the approach does involve more than prosecution alone, and these methods have undoubtedly saved many girls from undergoing FGM. Linda Weil-Curiel personally attested to this fact, when she spoke about the impact her work has had: "A year and a half ago a woman contacted me wanting to know if her parents had been tried. I checked and found the file. She read the file and felt completely disheartened but later she called and said, 'my youngest sister thanks you. Because of the trial she was saved'. And many have said the same thing over the years".[1090]

Significant time has been spent in the chapter discussing the genital examination intervention, which stakeholders in both France and England agree has been pivotal to France's prosecutorial success. The attitudes concerning this particular intervention has illuminated the fundamental difference between France and England, that is, their distinctly differing national philosophies of integration, and how that filters down and influences the actions each country takes in response to FGM. French republican principles are imprinted and replicated in the universalist interventions it has taken against FGM as has been illustrated; and similarly,

[1090] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 99.

England's more culturally relativist, laissez-faire approach to FGM, reflects the British multiculturalist model which to an extent acknowledges and accommodates cultural difference.

It is also apparent that other aspects of the Medium in both France and England have exercised an influence on the vastly divergent enforcement outcomes, inter alia: differing attitudes towards the human body, healthcare, hygiene, sexuality and family life, have played a part. However, the Medium alone cannot explain the respective position that the two nations have reached to date. The impact of the Human Catalyst is powerfully demonstrated, by the provable influence of one woman, Linda Weil-Curiel, in bringing about a paradigm shift. Without her dogged campaigning and commitment to the cause, history in France would undoubtedly have played out differently.

Of course, the co-dependence of the Human Catalyst and the Medium must be recognised. Linda Weil Curiel was herself a product of the socio-cultural milieu in which she moved, her outlook was moulded by French republicanism, and her discourse was in harmony with its ideology. In this sense, the Medium shaped the Human Catalyst, and it is unsurprising that her approach was sufficiently in harmony with its ethos. At the same time, however, the action of this individual can be shown to have changed the environment in which she was set, just as an architect might be both influenced by the aesthetic tradition in which they move, but still alter the skyline of a city. The study demonstrates that legal evolution and social action are part of a collective project, but one which can only be impelled forwards by the individuals who make up the body politic.

CHAPTER EIGHT – CONCLUSION

8.1 Conclusion

On the face of it, England and France have many points of commonality; they each have colonial pasts, large immigrant populations, are signatories of the same international human rights instruments, experience similar social problems and exist within the same region of Europe. Yet on the shared problem of FGM, their approach is distinctly different. Furthermore, this contrasting approach has produced vastly divergent outcomes, particularly in prosecuting offenders, with France leading in that regard. And whilst the number of prosecutions is not the sole measure of a successful strategy, it is certainly what is quantifiable. Prevention outcomes, on the other hand, are largely unknowable by nature, although prosecutions should theoretically and logically have some deterrent effect. France's extensive prosecution record is a well-known and readily available fact in FGM discourse in Europe. The enormous gap in prosecutions between France and England is striking and what spurred this research. One wonders why these seemingly similar Western European liberal democracies should differ so dramatically in their response to FGM. From the outset, therefore, we began with the knowledge that France has been more successful in prosecuting FGM and sought to understand why.

In analysing France's success, I identified two interrelated forces as drivers of that success and developed the following terms in order to effectively demonstrate the phenomenon. The first

is the “Human Catalyst” which represents the individual. Linda Weil-Curiel is the Human Catalyst because her energising influence as an activist and lawyer galvanised action against FGM. The second is the “Medium” which encapsulates the social/legal/cultural framework within which the Human Catalyst operates and represents the deterministic forces at play. For France, the Medium includes both the overarching approach to multiculturalism in that constitutional paradigm, and the French republican tradition within which Linda Weil-Curiel’s efforts assumed legitimacy, force and impact. The contrast between the individualism which predominates in the English Medium, particularly in relation to philosophies of integration, and the collectivism of the French model, had a profound significance.

It was suggested at the start of the foregoing chapter, that the Medium and the Human Catalyst combined brought about the French success. This assertion was subsequently proven through analysis of the anti-FGM interventions championed by the Human Catalyst, which analysis revealed that inherent within these interventions were republican values; in other words, the interventions corresponded to the republican Medium which gave them legitimacy and force.

In historical causality scholarship[1091] there has been a long running debate between those who regard history as a “determined causal chain” and believe in the “vast impersonal forces” of history on the one hand, and those who give “priority to the role of the individual” (the Great Man theory) on the other.[1092] These two determinants – the “Great Man” and the

[1091] Edward H Carr, *What is history?* (New York Vintage 1961); Richard J Evans, *In Defence of History* (Granta Publications 1997); Isaiah Berlin, *Historical Inevitability* (Oxford University Press 1959).
[1092] Ann Talbot, ‘Chance and Necessity in History: E.H. Carr and Leon Trotsky Compared’ (2009) 34(2) Historical Social Research 88.

"determined forces" – provide an apt conceptual framework for the creation of our own terms – the "Human Catalyst" and the "Medium" – that are specific to the circumstances of this socio-legal study. And whilst it is beyond the scope of this thesis to go deep into these debates, the existence of these ideas provides sufficient justification for my own assertion, that in the case of FGM in France, it is not one or the other, but an interdependence of the Human Catalyst (the Great Man) and the Medium (the deterministic forces).

This gels with Plekhanov's statement, "… individuals can influence the fate of society. Sometimes this influence is very considerable; but the possibility of exercising this influence, and its extent, are determined by the form of organisation of society, by the relation of forces within it".[1093] Similarly, Grinin identifies the "very distinct" and "exclusively important role" that the "human factor" plays in history; he criticizes the determinist speculations that, "had this or that individual not come to the fore, another would have taken his or her place and the general course of history would have remained approximately the same," arguing that such allegations must be proven.[1094] Like Plekhanov, he nevertheless qualifies the influence of the individual as subject to the prevailing "social structure".[1095] Accordingly, he argues that "the significance of a figure depends not only on his or her personal properties but also on the situation in which he or she acts; therefore, romantic statements like 'The history of the world is but the biography of great men' and suchlike do not clarify the situation. The role of the individual depends on many various factors".[1096] Thus in similar form to the foregoing suggestions that both the "Great Man" and the wider deterministic forces are determinants

[1093] G V Plekhanov, *The Role of the Individual in History* (Lawrence & Wishart Ltd 1940) 41.
[1094] Leonid E Grinin, 'The Role of the Individual in History' (2008) 78(1) Herald of the Russian Academy of Sciences 64.
[1095] Ibid.
[1096] Ibid.

of history, it is our assertion that the Human Catalyst and the Medium are not only determinants of the French success, but in a larger sense are also determinants of the history of FGM in France.

It was also suggested in the foregoing chapter, that further to the Medium providing the necessary conditions for the Human Catalyst's actions to succeed, the same Medium is responsible for moulding the catalyst; in other words, the Human Catalyst is herself the product of the Medium. It is the norms and values of the Medium she inhabits that she espouses and exerts in her campaign against FGM, and consequently, because these values and norms are aligned with the values and norms of the Medium, her actions succeed because they are the product of a marriage that works. To put it another way, the universalist principles of the Medium correspond with the interventions championed by the Human Catalyst since the interventions themselves are universalist in nature, therefore, the process of implementing them is comparatively easier than it would be in a jurisdiction with a different Medium.

To test this theory, let us place France's Human Catalyst within England's multiculturalist Medium and apply therein the interventions she championed in France. Would the French approach work in England? This application exercise has, in fact, been carried out in the foregoing chapter's analysis of the genital examination intervention. To be precise, however, France's approach cannot work in England since it is fundamentally at odds with England's Medium, especially its multiculturalist and individualist model. It should be noted however that although we have focussed in detail on this element of the Medium, there are almost

certainly other aspects of divergence which would further torpedo any attempt to successfully import the French model wholesale e.g. attitudes to human bodies, sexuality and family life.

To transplant the French approach to England, would essentially mean transplanting the republican tradition at its core, to a jurisdiction with a distinctly different outlook. A set of legal and social provisions could not be expected to flourish in an alien Medium. In a loose, superficial way, this 'transplanting' exercise has been tried in practical terms and has indeed failed – as was previously delineated, when the Home Affairs Committee deliberated on the possibility of adopting the French approach in England, the proposal failed to attain sufficient support. The reasons for rejection reflect an English attitude towards such measures, with intervening voices describing them as offending civil liberties, being aggressive, and potentially traumatising to children. In contrast, from a French perspective, none of this negative descriptions have been deemed persuasive, or perhaps even recognisable, by the actors who were the architects of the policy.

It is an enlightening exercise that shows the silent yet influencing power (imagine a puppet-master) that these underlying philosophies of integration, and the wider Medium, have on FGM response. Jurisdictions have their unique constitutional cultures that cannot realistically be artificially reproduced elsewhere, yet if they are doing something well, it is natural to be curious as to the reason for their success. This indeed was the task for this research project, to try and understand why things play out differently in different legal cultural contexts. This thesis does not advocate for the replication of France's approach in England (though this has been somewhat suggested in the public domain by stakeholders). Rather, this work seeks to understand the French approach and why it works. As seen, these 'winning' interventions,

right down to the individual who pushed for them, are fundamentally the product of French republicanism; they are as dependent on the French Medium for their flourishing as a plant is on the soil and the climatic conditions of its native region. This does not mean that an approach that works for England cannot be found, it just could not be modelled to the French way. This also does not signify that France's approach is devoid of failings, nor that England's approach is without its strengths and its own successes. Assessing such issues, along with the task of discovering what measures might work for England, are important avenues for further research, but are outwith the scope of this thesis.

Consequently, this thesis has satisfied its objective. The twin considerations of the propitious nature of the French Medium for applying universal standards and protections to the collective body of the citizenry, irrespective of difference, and the impetus of the Human Catalyst, explain the prosecution rate. Conversely, England has not experienced a Human Catalyst who has found a formula sufficiently in harmony with its Medium, and prosecutorial efforts have repeatedly stalled.

In concluding, it is important to recognise that human beings are at the centre of this study. It is easy to get lost in the abstract legal and philosophical arguments, but FGM is far from abstract. FGM kills and maims and it robs women of their sexuality and freedom. It is a violent and inhumane act and its impact on the physical and mental health of girls and women is grave. Linda Weil-Curiel referenced a film that depicts FGM to a group of uncomprehending young boys, stating that it was "one of the best films because it shows the cruelty of the act":

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> A Somali activist (Leyla Hussein) made a film in which she moulded the private parts of a girl in clay so as to demonstrate excision to young boys who were arguing that it couldn't be that bad "if our parents allow it on our sisters". In the film she shows the moulded clay to the boys, gets hold of pruning clippers and violently cuts the sexual parts made of clay, explaining that "this is what is being done to your sisters".[1097]

It is therefore important to acknowledge that beyond the theoretical arguments are real human beings, the victims and survivors of FGM. Having highlighted the pain, injustice and loss, it is all the more necessary to acknowledge that the contribution of individuals has immense impact. Linda Weil-Curiel is not a victim of FGM, but she is one of the human beings at the centre of this study because of her enormous contribution. And whilst there *is* an intricate and nuanced dance between the Human Catalyst and the Medium, it ought not overshadow the fact that an ordinary human being was deeply affected by the death of a three-month-old girl, and the plight of little girls just like her. Having awakened to the impact on vulnerable individuals, she made the conscious choice to engage in advocacy and expend her legal skills for the cause of protecting girls against excision. Though the Medium "made" the Human Catalyst and is a silent actor alongside her, the Human Catalyst had agency, she was not an automaton compelled by external forces. The impetus for her action was a deeply human one, springing from the fountain of empathy, and sensitive to a preventable tragedy. Her contribution is not just inspiring because of what it achieved in protecting girls, it is also inspiring because it shows that personal choice matters; an individual's agency matters, even to the point of influencing change and determining history.

[1097] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 98.

The weight of the choices of those able to exercise agency and social and political influence is pivotal to this thesis. Yet this must never be read as pushing the systematically disempowered into the shadows. They are the little human beings at the centre of this study. And ironically, though they lacked conscious agency, they too have made a difference. The life of three-month-old Bobo Traoré, though cruelly and senselessly cut short, first and foremost mattered because she was a unique human being. Bobo had a right to live, to grow up loved in safety and security. She was robbed of that, and the world lost the opportunity to be enriched by all that she might have become, created or given. Yet alongside this, her life mattered because the repercussions of her needless death largely changed the trajectory of FGM in France and even in England. Little Bobo was the original Human Catalyst – her story transformed Linda Weil-Curiel into a catalyst. It was her story reported in the newspapers in Paris that affected the lawyer so deeply and made her aware of excision in France. Ms Weil-Curiel described when she first learnt of little Bobo's death as follows: -

> In 1982 I belonged to the feminist movement founded by Simone de Beauvoir. We had a meeting and a fellow feminist friend brought a newspaper with an article about a 3 month-old baby girl (Bobo Traoré) who'd died from bleeding after undergoing a procedure endorsed by her parents. . . It was heart-rendering. . . I discovered there had been a similar case about 18 months earlier that had had no publicity. I didn't know of this other case as excision was all very new in France.[1098]

[1098] Linda Mururu, 'Interview with Avocate Linda Weil-Curiel' (2022) 3 JRJ 90.

It must be acknowledged that although little Bobo's death appeared in the media, many others did not. Her tragic but unsung contribution shines a new light on the "Great Man theory". As it is classically expressed, this vision of human society focusses on the archetype of an adult white male, frequently able-bodied and enjoying educational and economic advantages. It makes little sense for the fragile and disempowered. Little Bobo was a tiny, helpless infant, utterly dependent on the family, community and society in whose hands she was quite literally held. She was marginalised in so many ways: a black, female child from a cultural minority living in a setting of economic disadvantage. Humankind owed her as much care as any other baby, arguably more, in light of her special vulnerability. Yet instead of that nurture, she was wounded, neglected and allowed to die. Nobody with the compassion or courage to save Bobo heard her cries in time. Nevertheless, the reverberation of her death sent shockwaves around the world and these continue to be felt.

Little Bobo's lack of agency and power, her utter dependency in fact, placed an immense burden of responsibility on the society. When that burden was dropped so dramatically, the moral crash was immense and it sent shockwaves which jolted Linda Weil-Curiel and others into action, ultimately saving other lives and sparing many little girls from excision. The legacy of Bobo demonstrates that human societies are interdependent networks, and the significance of the disempowered is as profound as those with prestige, wielding visible influence.

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